United States Court of Appeals

for the Second Circuit

APPENDIX

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74-2540

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P/S

United States Court of Appeals

For the Second Circuit.

ABERCROMBIE & FITCH COMPANY,

Plaintiff-Appellant,

vs.

HUNTING WORLD, INCORPORATED,

Defendant-Appellee.

On Appeal From The United States District Court
For the Southern District of New York

UNITED STATES COURT OF APPEALS
FILED
MAR 14 1975
DANIEL FINE
CLERK

Appendix on Appeal

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PERTINENT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ABERCROMBIE & FITCH COMPANY,

Plaintiff-Appellant,

vs.

HUNTING WORLD, INCORPORATED,

Defendant-Appellee.

----------x

1-29-70 Complaint filed.

2-24-70 Answer and Counterclaim of defendant filed.

3-12-70 Reply to counterclaim filed.

4-3-70 Notice of defendant 's motion for summary judgment filed.

4-14-70 Movant's statement of the material facts as to which it is contended there is no genuine issue of fact.

5-14-70 Plaintiff's Order to Show Cause (4-6-70), memorandum endorsed, Metzner, J. filed.

6-8-70 Plaintiff-Opposer's counter statement under Rule 9(g) filed.

4-23-71 Opinion partially denying defendant's motion for summary judgment, Lasker, J. filed.

6-1-71 Notice of Motion for an interlocutory Order under Rule 54(b), F.R.C.P. and 28 U.S.C. 1292 (b) filed.

6-18-71 Memorandum and Order denying Plaintiff's motion, Lasker, J. filed.

6-18-71 Order and judgment, Lasker, J. filed.

7-16-71 Notice of appeal filed.

April 26, 1972 - Opinion of the Court of Appeals reversing partial summary judgment of April 26, 1972

Nov, 29, 30, Dec. 3, 4, 1973 - Transcript of trial proceeding

Sept. 30, 1974 - Decision of Hon. Sylvester J Ryan.

Oct. 10, 1971 - Plaintiff's Motion for Reconsideration.

October 9, 1974 Order denying reconsideration.

October 10, 1974 - Final Judgment.

Nov. 7, 1974 - Notice of Appeal.

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COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

COMPLAINT

Plaintiff, complaining of the defendant, alleges:

Jurisdictional Statement

1. This is a civil action arising under the Trademark Act of 1946 (Lanham Act) 15 U.S.C. and under Article 24 (Trade-Marks, Service-Marks and Business Reputation) of The General Business Law of the State of New York, as amended. This Court has jurisdiction under 28 U.S.C. 1332, 1338(a), and 1391, 15 U.S.C. 1121 and 1125(a), and under the code of the State of New York.

2. Plaintiff, Abercrombie & Fitch Company (hereinafter sometimes referred to as "ABERCROMBIE") is a corporation of the State of New York, having a place of business at Madison Avenue and 45th Street, in the City and State of New York

3. On information and belief, defendant, Hunting World, Incorporated (hereinafter sometimes referred to as "HUNTING WORLD") is a corporation of the State of New York, having its principal place of business at 247 East 50th Street in the

City and State of New York 10022.

History of Plaintiff's Use
Of The Expression "SAFARI"

4. For many years, plaintiff (ABERCROMBIE) has done business as a high-class retail store with emphasis on sporting, camping and other goods for lovers of the outdoor life. Plaintiff's slogan "The Greatest Sporting Goods Store in The World" epitomizes the theme of the plaintiff's image, in the total range of clothing and accessories embraced by this expression. Plaintiff's business has long been of interstate and national proportions, there being other of plaintiff's retail establishments in San Francisco, California; Chicago, Illinois; Colorado Springs, Colorado; Troy, Michigan; Palm Beach and Bel Harbour, Florida; and Short Hills, New Jersey. Plaintiff's goods marked SAFARI and sold through these stores and through plaintiff's extensive mail order business has been substantial in the State of New York and across the nation.

5. Many years ago, plaintiff adopted its trademark SAFARI in application to articles exclusively offered and sold by plaintiff, and this mark has become a most important and valuable means of identification of plaintiff with its exclusive offerings. Beginning in 1936, plaintiff has used its mark

SAFARI on men's and women's outer garments. Such use has included jackets, shorts, skirts, trousers, hats, caps, helmets, dresses, sweaters, coats, raincoats, gloves, scarfs, ties, socks, and cloth for outer garments. Plaintiff's natural expansion of its SAFARI use on clothing has included men's and women's shirts, shoes, belts, underwear, fishing vests, wading jackets, and men's swim trunks.

6. Plaintiff's United States trademark registrations include:

Trademark	Number	Issued	Goods
SAFARI	358,781	7/26/38	Men's and women's outer garments, including hats.
SAFARI MILLS	125,531	5/20/19	Cotton piece goods.
SAFARI	652,098	9/24/57	Men's and women's outer garments, including shoes.
SAFARI	703,279	8/23/60	Woven cloth sporting goods apparel.

And plaintiff is the owner of New York State Registration No. R-8008, dated June 30, 1964, for the mark "SAFARI" for sporting goods apparel including hats and socks.

7. Prior to defendant's acts of which complaint is herein made, plaintiff had spent, and has since continued to spend, large sums of money in the advertising and promotion of its business including products identified with its mark SAFARI.

Plaintiff's SAFARI products have been advertised in consumer magazines and in catalogs having nationwide circulation, and in newspapers throughout the country.

8. Plaintiff has incurred substantial expenditures in the policing of its rights in and to its mark SAFARI; such policing has included successful conclusion of trademark infringements by others in the sale of apparel such as hats and shoes.

9. The designation SAFARI is recognized by the public as a source identification, unique to plaintiff, in the field of sporting apparel.

The Infringing and Tortious Acts of HUNTING WORLD

10. Defendant HUNTING WORLD is engaged in the retail marketing of sporting apparel including hats and shoes identified SAFARI, alone or in an expression dominated by SAFARI, namely, MINISAFARI and SAFARILAND. Defendant's sales of products thus identified fall squarely within the field of plaintiff's SAFARI goods and are infringements of plaintiff's valuable trademark rights. Defendant has advertised and promoted the sale of its infringing products both in the State of New York and in media having interstate and national circulation, and such acts are further infringements of plaintiff's valuable trademark rights.

11. Plaintiff has requested that defendant cease its infringement of plaintiff's mark SAFARI, and defendant has been notified of said Registrations No. 652,098 and R-8008.

12. On information and belief, defendant has only recently embarked on sale of its hats marked MINISAFARI, at a time subsequent to plaintiff's correspondence objecting to defendant's prior infringements of plaintiff's mark SAFARI; and on information and belief, this is the first of defendant's products to bear a mark containing the expression "SAFARI". Defendant's recent adoption of MINISAFARI represents a willful and deliberate aggravation or the SAFARI infringements which were the subject of plaintiff's earlier notice to defendant.

13. In application to sporting apparel including hats and shoes, defendant's use of the expressions "SAFARI", "SAFARILAND" and "MINISAFARI", is a false designation of origin within the meaning of the 1946 Trademark Act.

14. The continued infringing acts of the defendant are likely to:

(a) Confuse and deceive the public into believing that the defendant is plaintiff, or is a subsidiary of plaintiff, or is otherwise related to or connected with plaintiff, its business and products;

(b) Injure plaintiff's business reputation and endanger plaintiff's good will;

(c) Dilute, render less valuable or destroy the distinct and unique quality of the plaintiff's trademark;

(d) Destroy or impair plaintiff's natural expansion of its business under its trademark SAFARI into fields in which it and its subsidiaries are not now engaged.

15. On information and belief, defendant has caused or is about to cause to be filed in the United States Patent Office, and perhaps elsewhere, separate applications to register "MINISAFARI" and "SAFARILAND", as trademarks for goods covered by one or more of plaintiff's SAFARI trademark registrations as aforesaid. The issuance of registrations based on said applications will cause further injury to plaintiff because inter alia of the resulting false appearance of validity to defendant's claim of trademark rights in "MINISAFARI" and "SAFARILAND".

16. The foregoing HUNTING WORLD acts complained of constitute a violation of the Federal and New York State laws relating to trademark infringement and unfair competition.

17. The damage to plaintiff by reason of continued

acts of infringement and false representation is incalculable and such damage will become irreparable unless the activities complained of are enjoined by this Court.

WHEREFORE, plaintiff demands judgment against defendant as follows:

1. That defendant, its officers, servants, agents, sub-divisions, and subsidiaries, and all those in privity with defendant, be enjoined from any further infringement of plaintiff's mark "SAFARI".

2. That defendant be ordered to abandon any and all its applications to register SAFARI-based trademarks, in the United States and elsewhere.

3. That defendant's infringing products, literature and other promotional material be delivered to an officer of the Court or to plaintiff, to be destroyed.

4. That there be an accounting for damages and profits by reason of the alleged infringement.

5. For such further relief as the Court deems just and proper, together with the costs of this action.

Dated: New York, New York
January 29, 1970

/s/ Roy C. Hopgood
Roy C. Hopgood
Attorney for Plaintiff
60 East 42nd Street
New York, New York 10017
212-986-2480

OF COUNSEL:

Sandoe, Hopgood and Calimafde
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

ANSWER AND COUNTERCLAIMS

Defendant HUNTING WORLD, INCORPORATED, by its attorneys, Sulzberger, Wels & Marcus, as and for its answer to the complaint herein, respectfully shows to the Court and alleges:

1. Denies each and every allegation contained in the paragraphs of the complaint numbered "5", "7", "8", "9", "12", "13", "14", "15", "16", and "17".

2. Denies each and every allegation contained in paragraph "4" of the complaint, except that defendant admits that plaintiff has for many years done business in the City of New York as a high class sporting goods store, and presently maintains branches in other cities.

3. Lacks knowledge or information sufficient to form a belief with respect to the allegations contained in paragraph "6" of the complaint.

4. Denies each and every allegation contained in paragraph "10" of the complaint, except that defendant admits that it is engaged in the retail marketing of sporting apparel

including hats and shoes identified as "Safari Shoes" and "Hats For Safari", and has further used the words "Safariland" and "Minisafari" in connection with the retail marketing of such apparel.

AS A FIRST SEPARATE AND COMPLETE DEFENSE, AND AS A COUNTERCLAIM AGAINST THE PLAINTIFF, DEFENDANT ALLEGES

5. Repeats each and every allegation contained in paragraphs 1 through 4, inclusive, of this answer, with the same force and effect as if the same were repeated and restated here in full.

6. That the word "safari" is an ordinary, common, descriptive, geographic, and generic word not subject to exclusive appropriation as a trademark under the Trademark Act of 1946, or under the General Business Law of the State of New York.

7. That the word "Safari" is a word in the Swahili and Arabic languages, which, since prior to 1892, has been adopted into the English language, and is commonly used and understood by the public to mean and refer to a journey or expedition, especially for hunting or exploring in East Africa, and to the hunters, guides, men, animals, and equipment forming such an expedition.

AS A SECOND SEPARATE AND COMPLETE DEFENSE, AND AS A COUNTERCLAIM AGAINST THE PLAINTIFF, DEFENDANT ALLEGES

8. Repeats each and every allegation contained in paragraphs 1 through 7, inclusive, of this answer, with the same force and effect as if the same were repeated herein full.

9. On information and belief, that plaintiff has caused to be filed in the United States Patent Office applications for the registration as trademarks of the words "Safari" and "Safari Mills", and has caused registrations of such words to be issued to it by the Commissioner of Patents.

10. That the registration by plaintiff of the words "Safari" and "Safari Mills" as trademarks in the United States Patent Office was obtained fraudulently by plaintiff, in that plaintiff failed to disclose to the United States Patent Office that the word "safari" is an ordinary, common, descriptive, geographic, and generic word understood by the public to refer to a journey or expedition, especially for hunting and exploring in East Africa, and to the hunters, guides, men, animals, and equipment forming such an expedition, and that the word "safari" is an ordinary, common, descriptive, geographic, and generic word which cannot be exclusively appropriated by any individual or corporation, and that plaintiff stated to the United States

Patent Office that plaintiff was the owner of the word "Safari" and that no other person had the right to use the word "Safari" in commerce, all to the damage of defendant.

AS A THIRD SEPARATE AND COMPLETE DEFENSE, AND AS A COUNTERCLAIM AGAINST THE PLAINTIFF, DEFENDANT ALLEGES

11. Repeats each and every allegation contained in paragraphs 1 through 10, inclusive, of this answer, with the same force and effect as if the same were repeated here in full.

12. On information and belief, that plaintiff has caused to be filed with the Secretary of State of the State of New York an application for a registration as a trademark of the word "Safari" and has caused a registration of such word to be issued to it by the Secretary of State of the State of New York.

13. That the registration by plaintiff of the word "Safari" as a trademark with the State of New York was obtained fraudulently by plaintiff in that plaintiff failed to disclose to the Secretary of State of the State of New York that the word "safari" is an ordinary, common, descriptive, geographic, and generic word understood by the public to refer to a journey or expedition, especially for hunting and exploring in East Africa, and to the hunters, guides, men, animals, and equipment forming such an expedition, and that the word "safari" is an

ordinary, common, descriptive, geographic, and generic word which cannot be exclusively appropriated by any individual or corporation, and that plaintiff stated to the Secretary of State that no person, partnership or corporation had the right to use the word "safari", all to the damage of the defendant.

AS A FOURTH SEPARATE AN[illegible]E DEFENSE, DEFENDANT ALLEGES

14. Repeats each and every allegation contained in paragraphs 1 through 13, inclusive, of this answer with the same force and effect as if the same were repeated here in full.

15. That since 1960 the defendant has used the word "Safari", either alone or in connection with other words such as "Safari Shoes from Safariland", "Safari Chukka", "Hippo Safari", "The White Hunter - The Hat for Safari", "Minisafari", "Safari Clothes", "Safarigrade Zebra Rugs", "On Safari", "Safari Today", and "Safariland News" in good faith, as a descriptive term, and only to describe to users the goods or services furnished by defendant, or their geographical origins.

AS A FIFTH SEPARATE AND COMPLETE DEFENSE, DEFENDANT ALLEGES

16. Repeats each and every allegation contained in paragraphs 1 through 15, inclusive, of this answer with the

same force and effect as if the same were repeated here in full.

17. Plaintiff had notice of all of the facts and of all of the acts of the defendant alleged in the complaint and nevertheless refrained from commencing this action until January 29, 1970, and has thereby been guilty of such laches and estoppel as should in equity bar the plaintiff from maintaining this action in that plaintiff has concurred in and approved of the use of the word "Safari" by defendant in connection with goods and services furnished by defendant, and has caused defendant to print more than 10,000 copies of a brochure using the word "Safari" in connection with the defendant and in connection with goods and services furnished by defendant to the public, and including an order blank whereby members of the public could purchase certain of such goods, stated to have been discovered by the president of defendant while on safari in Africa, directly from plaintiff.

18. This Court has jurisdiction of the counterclaims set forth herein under Rule 13(a), Federal Rules of Civil Procedure, 28 United States Code, 1332, 1338(a), and 1391, 15 United States Code 1119, 1120, and 1121, and Sections 367 and 368-A of the General Business Law of the State of New York.

WHEREFORE, defendant demands judgment for the defendant and against the plaintiff, (1) dismissing the complaint herein, (2) directing and ordering the Commissioner of Patents to cancel Trademark Registration Numbers 358,781, 125,531, 652,098 and 703,279 heretofore issued to plaintiff to the extent that they embody the word "safari", pursuant to Title 15, Section 1119, United States Code, (3) making an award against plaintiff and to defendant for damages sustained by defendant, including attorney's fees and the costs of defending this action, by reason of plaintiff having fraudulently procured registration of such trademarks in the Patent Office, pursuant to Title 15, Section 1120, United States Code, (4) directing and ordering the Secretary of State of the State of New York, pursuant to Section 367 of the General Business Law of the State of New York, to cancel from the register New York Registration R-8008 for the mark "Safari", and (5) making an award against plaintiff and to defendant, pursuant to Section 368-A of the General Business Law of the State of New York, for damages sustained by defendant, including attorney's fees and the costs of defending this action, by reason of plaintiff having fraudulently procured the registration of the word "Safari" in the office of the Secretary of State of the State of New York, and (6) for such further relief

as to the Court may seem just and proper, together with the costs of this action.

Dated: New York, N.Y.
February 17, 1970

SULZBERGER, WELS & MARCUS
Attorneys for Defendant
18 East 48th Street
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Telephone: 752-3122

By _____
Richard H. Wels
A Member of the Firm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

REPLY TO COUNTERCLAIMS

Plaintiff, ABERCROMBIE & FITCH COMPANY, by its attorneys, as and for its reply* to the defendant's counterclaims states:

A. As to the first counterclaim, alleged in Paragraphs 5, 6 and 7 of the ANSWER AND COUNTERCLAIMS:

5. Paragraph "5" is denied.

6. Admits that the word "safari" is a dictionary word, but denies the remainder of Paragraph "6".

7. Lacks knowledge or information sufficient to form a belief with respect to the Swahili and Arabic languages and therefore denies Paragraph "7".

B. As to the second counterclaim, alleged in Paragraphs 8, 9 and 10 of the ANSWER AND COUNTERCLAIMS:

* The paragraph numbering herein is matched to that of the defendant's ANSWER AND COUNTERCLAIMS.

8. Paragraph "8" is denied.

9. With respect to Paragraph "9", admits to having duly filed applications to register its mark "SAFARI" but denies having filed to register the mark "SAFARI MILLS"; the said mark "SAFARI MILLS" and its registration were acquired by assignment. Plaintiff denies having caused issuance of registrations other than by filing and by normal prosecution before the United States Patent Office.

10. Denies the allegations of Paragraph "10".

C. As to the third counterclaim, alleged in Paragraphs 11, 12 and 13 of the ANSWER AND COUNTERCLAIMS:

11. Paragraph "11" is denied.

12. With respect to Paragraph "12", admits to having duly filed applications with the Secretary of State of the State of New York, but denies having caused issuance of registrations other than by filing and by normal prosecution before the Secretary of State of the State of New York.

13. Denies the allegations of Paragraph "13".

D. As to the fourth counterclaim, alleged in Paragraphs 14 and 15 of the ANSWER AND COUNTERCLAIMS:

14. Paragraph "14" is denied.

15. Denies the allegations of Paragraph "15".

E. As to the fifth counterclaim, alleged in Paragraphs 16, 17 and 18 of the ANSWER AND COUNTERCLAIMS:

16. Paragraph "16" is denied.

17. Denies the allegations of Paragraph "17", except that after learning of defendant's infringing acts, plaintiff sought to avoid bringing litigation by initially giving defendant written notice of a charge of trademark infringement.

WHEREFORE, plaintiff prays that said counterclaims be dismissed and that judgment be granted to plaintiff with the relief sought in the prayer of the Complaint.

New York, New York
March 11, 1970

/s/ Roy C. Hopgood
Roy C. Hopgood
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OF COUNSEL:

Sandoe, Hopgood and Calimafde
New York, New York

DECISION OF HON. MORRIS E. LASKER

- - - - - - - - X

[657] Reported 327 F Supp. 657

SAME TITLE

- - - - - - - - X

United States District Court

S. D. New York

April 23, 1971.

Plaintiff brought suit in which it alleged that defendant's use of word "Safari" alone or in combination with other words infringed plaintiff's trademark. Defen-
[658] dant moved for summary judgment seeking determination that it had not infringed plaintiff's trademark rights. The District Court, Lasker, J., held that assertions created issue of fact precluding summary judgment as to whether plaintiff created secondary meaning in word "Safari" as applied to its shoes and might be entitled protection.

Motion for summary judgment denied, except to extent of holding that defendant's use of word "Safari" in connection with general description of its business and its present uses of word "Safari" to describe its safari hat, "Minisafari" to describe its smaller safari hat and "Safariland" did not infringe such rights as plaintiff might have in use of the word "Safari"; each party held entitled to summary judgment against the other on its respective claim of misrepresentation.

1. Trade Regulation 164

Descriptive words indicative of origin may be registered as trademarks.

2. Trade Regulation 722

In suit alleging infringements under Trade-Mark Act of 1946 and Article 24 of the General Business Law of New York, evidence created question of fact precluding summary judgment as to whether plaintiff which registered "Safari" as trademark for shirts, shoes, belts, fishing vests, wading jackets, swim suits and other articles had created a secondary meaning in its use of the word identifying the source and showing that purchasers were moved to buy it because of its source and whether plaintiff would be able to register the word as a trademark, though it was a generic word. Lanham Trade-Mark Act Sections 1-45, 39, 15 U.S.C.A. Sections 1051-1127, 1121; General Business Law N.Y. Section 360 et seq.; 28 U.S.C.A. Section 1332(a).

3. Trade Regulation 365

Where word "Safari" which was registered as plaintiff's trademark for shirts, shoes, belts fishing vests, wading jackets, swim suits and other articles was a weak mark and defendant used the word descriptively rather than as a trade mark, defendant had right to use the word in connection with description of its business

which centered on specific outfitting of safaris as well as sale of products with exotic appeal of the safari. Lanham Trade-Mark Act Sections 1-45, 39, 15 U.S.C.A. Sections 1051-1127, 1121; General Business Law N.Y. Section 360 et seq.; 28 U.S.C.A. Section 1132(a).

4. Trade Regulation 361

Defendant's use of word "Safari", which had been registered as plaintiff's trademark for shirts, shoes, belts, fishing vests, wading jackets, swim suits and other articles, as applied to classical safari hat and advertising of "The Hat For Safari" were purely descriptive and did not affect plaintiff's use of word as a mark for swordfisherman's cap. Lanham Trade-Mark Act Sections 1-45, 39, 15 U.S.C.A. Sections 1051-1127, 1121; General Business Law N.Y. Section 360 et seq.; 28 U.S.C.A. Section 1332(a).

5. Trade Regulation 361.

Defendant's use of "Safari" as part of novel coined expression in connection with defendant's so-called "Minisafari" hat in same style as genuine safari hat with brim trimmed back was not an infringement of any possible trademark of plaintiff because it was fresh and original in its creation, it was literally descriptive of product to which it attached, was a product sufficiently different from plaintiff's swordfisherman's cap to avoid

possibility of confusion and it was sufficiently distinct from use of "safari" alone not to connote the same origin. Lanham Trade-Mark Act Sections 1-45, 39, 15 U.S.C.A. Sections 1051-1127, 1121; General Business Law N.Y. Section 360 et seq.; 28 U.S.C.A. Section 1332(a).

6. Trade Regulation 365.

Where word "Safariland" was used by defendant to connote a shop or a portion of a shop and the name of a New York corporation and in name of newsletter which was issued irregularly, use of "Safari" as part of that original coined expression was not an infringement of possible
[659] trademark of plaintiff which had registered "Safari" as trademark for shirts, shoes, belts, fishing vests, wading jackets, swim suits and other articles. Lanham Trade-Mark Act Sections 1-45, 39, 15 U.S.C.A. Sections 1051-1127, 1121; General Business Law N.Y. Section 360 et seq.; 28 U.S.C.A. Section 1132(a).

7. Trade Regulation 722

Assertions that both plaintiff and defendant sold shoes using the mark "Safari" in fanciful rather than purely descriptive sense and none of shoes appeared to be designed for actual use on safari though some of defendant's shoes might have been made in Africa of African materials created genuine issue of fact pre-

cluding summary judgment as to whether plaintiff which had registered "Safari" as trademark for shirts, shoes, belts, fishing vests, wading jackets, swim suits, and other articles might be entitled to protection as applied to its shoes. Lanham Trade-Mark Act Sections 1-45, 39, 15 U.S.C.A. Sections 1051-1127, 1121; General Business Law N.Y. Section 360 et seq.; 28 U.S.C.A. Section 11132 (a).

Sandoe, Hopgood & Calimafde, New York City, for plaintiff; Roy C. Hopgood, New York City of Counsel.

Sulzberger, Wels & Marcus, New York City for defendant; Richard H. Wels, New York City, of counsel.

LASKER, District Judge.

Defendant, Hunting World, Inc., moves for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure seeking a determination that it has not infringed plaintiff's trademark rights in the word "Safari." The complaint alleges infringements under the Trade-Mark Act of 1946 (Lanham Act), 15 U.S.C.A. Sections 1051-1127, and Article 24 of the General Business Law of New York, McKinney's Consol. Laws, c. 20. Jurisdiction is founded on 28 U.S.C.A. Section 1332(a) and 15 U.S.C.A. Section 1121.

FACTS

Plaintiff is a New York corporation which since 1904 has specialized in the sale of high quality sporting goods designed to appeal to the more affluent purchaser.

As early as 1919, a trademark in the words "Safari Mills" had been granted to a certain Robert A. Suffern to be used in connection with cotton goods. This trademark was renewed in 1939 and thereafter assigned to Abercrombie & Fitch; it was again renewed by Abercrombie in 1959. The plaintiff began using the word "Safari" in connection with men's and women's outer garments in 1936, and registered a trademark using the word "Safari" for that type of clothing in 1938.

In 1957 "Safari" was registered as plaintiff's trademark for shirts, shoes, belts, fishing vests, wading jackets and swim suits. Between 1957 and 1968 the trademark "Safari" was registered as to further products: woven cloth sporting goods apparel, hats, luggage, a portable grill, insulated ice chests, camping tents, axes, and smoking pipe tobacco. Finally, in 1964, under New York law, plaintiff also registered the trademark "Safari" for luggage, sporting goods apparel (including shoes and hats), camping and outdoor equipment.

Abercrombie has advertised its products using the "Safari" trademark in its catalogues, of which some

400,000 have been distributed over the past eight years, and in newspapers in New York, Chicago, San Francisco and other cities where plaintiff maintains stores. Since 1936 plaintiff asserts that it has retailed some $19,000,000 worth of goods with the "Safari" label. Plaintiff does not state how much of its advertising has been devoted to promoting the "Safari" label. It claims that it has policed its rights to the trademark "Safari" in exchanges of letters or Patent Office proceedings in some 56 instances since 1950, the bulk occurring in the 1960's.

Defendant is a New York corporation which began
[660] its business in New York City in 1965 as an outgrowth of Lee Expeditions, Ltd., an organizer of safaris and expeditions in Africa, Asia and India. Lee Expeditions continues to seek products in those areas for distribution through Hunting World. All of Hunting World's merchandise is related to safaris and hunting, either for use in such activity, as, for example, in pictures and art work of wildlife and hunting, hunt trophies, or exotic products such as elephant skin clothing products.

Hunting World markets an ankle-high boot called a chukka, advertised as "The Safari Chukka" with such puffing in the ads as "Safari Shoes from Safariland! - Made in Kenya by Kenya's finest bootmakers - Authenticity." Defendant also markets hats for use on actual safaris

and distributes a model with the brim cut down called a "Minisafari" which it had advertised in the New York press with the Code "TM" displayed, indicating its intent to protect the name with trademark registration.

Hunting World describes a section of its New York City store as "Safariland." This is also the title of a New York corporation, Safariland, Ltd., owned by the President of Hunting World, Robert M. Lee. "Safariland" has been used with the code "TM" but appears not to be a registered trademark up to now. Safariland News is the name of a newsletter issued at irregular intervals over the past eleven years by Lee Expeditions and by Hunting World. Defendant also sells some luggage made of elephant leather and zebra skin, and has marketed clothing designed for use on a safari described as "Kalahari" (after the African desert) or as "Safari clothes from Safari Country."

The parties here agree that "[t]he word 'safari' is a word found in Swahili and Arabic languages, which, since prior to 1892, has been adopted into the English language, and is commonly used and understood to mean and refer to a journey, or expedition, especially for hunting or exploring in East Africa, and to the hunters, guides, men, animals, and equipment forming such an expedition." (Defendant's General Rule 9(g) Statement, paragraph 3;

"Admitted" in Plaintiff's Rule 9 (g) Statement).

CONTENTIONS OF THE PARTIES AND ISSUES TO BE DETERMINED

The complaint alleges that defendant's use of the word "Safari" alone or in combination with other words ("Mini-safari" or "Safariland") infringes plaintiff's trademark. It presses the usual arguments in a case of this type that (a) the public is confused into believing that defendant's products are those of the plaintiff, (b) defendant's activities have injured plaintiff's reputation and good will, (c) defendant's use of the word derogates the value of plaintiff's trademark, and (d) destroys the natural extension by plaintiff of its use of the word "Safari." Plaintiff further claims that defendant has, in its application for trademark registrations, misrepresented the origins of the terms "Minisafari" and "Safariland" and as to defendant's right to use them exclusively.

In addition to denying these allegations, defendant asserts several defenses and counterclaims. It argues (a) that "safari" is a descriptive word not subject to exclusive trademark use and that defendant has used it only in a descriptive manner; (b) that defendant's use of the word in coined expressions ("Minisafari" and "Safariland") is entitled to protection

because of their novelty and distinction; (c) that since "safari" is a common word as to which plaintiff has developed no secondary meaning, the plaintiff has misrepresented the facts in registering its trademark; (d) that plaintiff is guilty of laches in bringing this suit; and (e) that plaintiff has assigned its rights to the trademark and therefore lacks standing to sue.

[661] As indicated in the footnote,[1] we find no merit in defendant's contentions of misrepresentation by plaintiff or of laches or lack of standing to sue. We proceed, therefore, to the residual but key issues, which are:

(1) May the word "Safari" alone be validly registered as a trademark?

(2) If so, may summary judgment be granted as to any of the defendant's uses of the word "Safari"?

(1) Can there be a trademark in the word "Safari"?

Defendant argues that a "common, ordinary, descriptive word [as "safari" is] may not be appropriated through the device of a trademark registration, and others thereby prevented from making use of it." (Memorandum of Law in Support of Defendant's Motion at 3). These contentions, however, are an oversimplification of the law.

We start from the proposition, acknowledged by

the parties, that the word "safari" has entered widely into the common vocabulary of English-speaking peoples. Its general meaning is set forth above, and this meaning
[662] is substantially correct according to lexicographers.[2] It is used in a variety of descriptive senses related to its basic meaning. Cf. the use of the word in United States ex rel. Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969).

[1] It is, of course, true that "[d]escriptive words receive less protection under the law of trademarks than fanciful or coined words because words in our general vocabulary which all can use to describe products or services should not be unduly limited." Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495, 498 (2d Cir. 1962). Nonetheless, descriptive words indicative of origin may be registered as trademarks.[3] As was concisely stated in W. E. Bassett Co. v. Revlon, Inc., 354 F. 2d 868, 871 (2d Cir. (1966):

> "The purpose of the trademark laws is to protect the public from the confusion and deception which flows from the copying of marks which, through their distinctiveness or exclusivity of use, identify the origin of the marked products. Marks descriptive of a product seldom perform this function. Moreover, since there are only so many words that can accurately describe a type of product, the law does not favor trademark monopolization of such descriptive terms. See 15 U.S.C. Section 1052 (e). Consequently, a mark that is merely descriptive of a class of products will receive no protection against infringement unless it has acquired 'secondary

meaning,' i.e., unless the 'primary significance of the term in the minds of the consuming public is not the product but the producer.' Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 118, [59 S. Ct. 109, 113, 83 L.Ed. 73] * * *. See Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495 (2 Cir. 1962)." (Emphasis added.)

[2] Although "safari" is a generic word, a genuine issue of fact exists as to whether the plaintiff has created a secondary meaning in its use of the word "identifying the source" and showing that "purchasers are moved to buy it because of its source," Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694, 697 (2d Cir. 1961); see also American Lead Pencil Co. v. L. Gottlieb & Sons, 181 F. 178, 181 (2d Cir. 1910, Judge Learned Hand). Plaintiff is entitled to establish in the discovery process or on trial its contention that a secondary meaning has been created. Accordingly, summary judgment cannot be granted on this issue.[4]

(2) May summary judgment be granted on any of defendant's uses of "Safari"?

Even though plaintiff has registered "Safari" as a mark for the products in issue here[5] and the question of secondary meaning remains undecided, "[t]he registering of a proper noun as a trademark does not withdraw it from the language, nor reduce it to the exclusive possession of the registrant which may be jealously guarding it against any and all use by others." Societe Comptoir

De L'Indus., etc. v. Alexander's Department Stores, Inc., 299 F.2d 33, 36 (2d Cir. 1962). This Circuit has adopted the observations set forth in 3 Callman, Unfair Competition
[663] and Trademarks Section 19 (2d Ed.):

> " ' In essence, the distinctiveness and popularity of the trade-mark will determine its relative strength or weakness and will accordingly define the scope of protection to be accorded the mark against the confusing similarity of others. * * * If the mark is weak, its protection may have an "extremely narrow scope"; and may indeed be limited to similar goods similarly marketed. Only the strong mark will be protected against infringements arising out of its use in connection with noncompeting goods.' " Westward Coach Manufacturing Co. v. Ford Motor Co., 388 F.2d 627, 634 (7th Cir. 1968).

The specific infringements complained of by plaintiff consist of "the retail marketing of sporting apparel including hats and shoes identified SAFARI, alone or in an expression dominated by SAFARI, namely, MINISAFARI, and SAFARILAND." (Paragraph 10 of Complaint). (Although the complaint speaks of goods described by the word "Safari" as "including" hats and shoes, no other goods have been identified in this category.) The general description of defendant's business and defendant's advertising employs the motif of the safari and of African and Asian expeditions. Insofar as this general description is alleged to be an infringement because it relates to retail marketing, it is discussed with each of the specific infringements identified below.

(a) General description

[3] If plaintiff's attack on "the retail marketing of sporting apparel" by the defendant (Paragraph 10 of Complaint) is intended to suggest that defendant has no right to use the word "Safari" in connection with the description of its business, plaintiff's contention is untenable. We have already noted that the word "Safari," even when usable as a trademark, is a weak mark. However, here defendant's right to use the word "Safari" in connection with the description of its business - as distinguished from the sale of products, which we treat below - is based not only on the weakness of the mark, but, more importantly, on the fact that defendant uses the word descriptively rather than as a trademark. Hunting World, Inc., grew from the operation of a company which actually organizes safaris and has common officers with that company. Defendant's business activity centers on the specific outfitting of safaris, as well as the sale of products with the exotic appeal of the safari. We have here one of the not infrequent cases in which two parties may share between them the various uses of a single word. As stated by the Court of Appeals of this Circuit in King-Seeley Thermos Co. v. Aladdin Industries, Inc., 418 F.2d 31, 35 (1969):

> "A case like this involves * * * the need for drawing the line between two kinds of right-

doing, King-Seeley's legitimate interest in protecting its trademark insofar as this is valid and Alladin's equally legitimate interest in being free to sell its products by use of a generic term, and their opposites, attempts by King-Seeley to extend its trademark beyond its legal bounds and efforts by Alladin to encroach upon the protected area."[6]

(b) Hats

[4] Defendant sells two hats marked with the
[664] word "Safari." The first is a broad-rimmed hat with a wide band, easily recognized as the classical safari hat. On its inner band appears the profile of the head of a Greek warrior and the brand name "Dorian" in large block letters. Beneath the brand name, in smaller block letters appears the word "Safari." This use, and the advertising of "The Hat For Safari," is purely descriptive and can no more offend any possible trademark of plaintiff than would the use of the word "fedora" to describe that type of hat. The facts here are strinkingly similar to those in Feathercombs, Inc. v. Solo Products Corp., 306 F.2d 251, 254 (2d Cir. 1962). There the court observed:

"The court below found, and properly so, that this word ['Featherlight'] was merely used to describe the qualities of Solo's hair roller, and was not used in a trademark sense. That is, the word 'Featherlike' was not meant to convey to the public the fact that the product was manufactured by a particular company and was not indicative of source. A mere examination of Solo's advertising in the period between 1938 and 1957 bolsters this conclusion, for the words "Solo" in block letters was given

> great prominence in the display of the hair roller, while the word 'Featherlight' was depicted in much smaller block lettering."

The only hat as to which plaintiff uses "Safari" as a mark is a "swordfisherman's cap," but this fanciful use of the word by the plaintiff for a completely different product is not infringed by defendant's purely descriptive use. See Safeway Stores, Inc. v. Safeway Properties, Inc., supra, 307 F.2d at 499:

> "To the extent that the term 'Safeway' is descriptive instead of fanciful, * * *, the defendant is still entitled to use the term in good faith as a description of its business or services. The plaintiff may only restrain the trademark use of the term by the defendant, that is, the use of the term as a symbol to attract public attention." (Citing cases.)

[5] The second hat alleged to infringe is defendant's so-called "Mini-safari" hat, a hat in the same style as the genuine safari hat, with the brim trimmed back. The use of "safari" here as part of a novel coined expression is not an infringement of any possible trademark of the plaintiff for several reasons: (1) it is fresh and original in its creation; (2) it is literally descriptive of the product to which it attaches, a little safari hat; (3) it is a product sufficiently different from plaintiff's swordfisherman's cap to avoid the possibility of confusion; (4) in any event, it is sufficiently distinct from the use of "safari" alone not to connote the same origin. See

Sears, Roebuck & Co. v. Haymer, 263 F.2d 348, 46 CCPA 783 (1959); American Tobacco Co. v. Polacsek, 170 F. 117 (C.C.S.C.N.Y. 1905).

(c) "Safariland"

[6] The coined word "Safariland" is described by the President of defendant as follows: "It connotes a location, that is, a shop or a portion of a shop, a SAFARILAND boutique or a portion of a shop, and it also is the name of a New York corporation called Safariland, Ltd. * * * [which is] involved in the wholesale distribution of products imported by Lee Expeditions, Ltd." (Deposition of Robert M. Lee, May 25, 1970, at 12). The word is also used in the name of "Safariland News" which Lee Expeditions and Hunting World issue irregularly as a newsletter.

As is the case with "Minisafari," the use of "safari" as part of this original coined expression is not an infringement. (1) "Safariland" does not relate to any specific product in competition between the parties; (2) it is sufficiently unique and distinct so that confusion is unlikely; (3) it is used in a descriptive sense arising out of defendant's actual involvement in conducting or outfitting safaris and in capitalizing on the exotic appeal of the safari; (4) plaintiff's rights in "safari", assuming arguendo secondary meaning may be

[665] shown, are rights in a weak mark, and "[i]f the mark is weak, its protection may have an 'extremely narrow scope'; and may indeed be limited to similar goods similarly marketed." Westward Coach Manufacturing Co. v. Ford Motor Co., supra, 388 F.2d at 634.

In sum, defendant is entitled to use the word "Safari" to describe those of its products which relate to the practice or cult of safari. If gathering these into a part of its store and calling it "Safariland" is defendant's trade practice, it does not thereby infringe plaintiff's use of "Safari." Defendant is entitled to register its coined expression "Safariland" but, of course, whether that mark if valid or not will turn on whether it indicates origin.

(d) Shoes

[7] Both parties sell shoes using the mark "Safari." In this case the word is used by both parties in a fanciful rather than a purely descriptive sense. None of the shoes appears to be designed for actual use on a safari, although some of defendant's shoes may be made in Africa of African materials. Because "Safari" is used in a fanciful sense suggestive of origin, the possibility of infringement arises.[7]

Since a genuine issue of fact exists as to whether plaintiff has created a secondary meaning in the

word "Safari" as applied to its shoes, no summary judgment can be granted on this issue.

CONCLUSION

The motion for summary judgment is denied except to the extent of holding that defendant's use of the word "Safari" in connection with the general description of its business and its present uses of the word "Safari" to describe its safari hat, "Minisafari" to describe its smaller safari hat, and "Safariland" do not infringe such rights as plaintiff may have in the use of the word "Safari." Finally, each party is entitled to summary judgment against the other on its respective claim of misrepresentation.[8]

Submit order on notice.

[661] 1. (A) Misrepresentation

Defendant alleges that plaintiff misrepresented to the Patent Office that it had the sole and exclusive use of the word "Safari" and thus obtained its trademark by fraud. Au contraire plaintiff asserts that defendant, in claiming trademark on coined words including the word "safari", is guilty of misrepresenting its exclusive right to the word so coined.

However, neither party presents any evidence beyond these characterizations of the claims of its adversary; nor has either party indicated that it could do so. In fine, it appears that neither claim is supported by the facts, and accordingly summary judgment is granted on this issue to each of the parties against the other.

Both plaintiff and defendant have made honest claims and their contentions are substantial. The word "Safari" had been registered as plaintiff's trademark and plaintiff properly sought the sole right to use the word in a trademark sense as to its products. Defendant, also properly, sought to use a dictionary word in a descriptive sense closely related to, if not synonymous with, the theme of its entire business. For its coined expressions it properly sought the exclusive right to use them in a trademark sense.

The Patent Office has issued trademarks for "Safari" to numerous persons for different products. Clearly the Patent Office by its own deeds does not assign "Safari" to any one person for all purposes, and when the word is assigned for a specific product its use is exclusive so long as it validly indicates origin.

(B) Laches

The evidence of record does not demonstrate that plaintiff has been guilty of laches. Over the past decade plaintiff has policed its rights in "Safari" and secured voluntary cessation of allegedly conflicting uses of the word from nearly three score of stores and amnufacturers. (Affidavit of Henry C. Geis, sworn to June 5, 1970, at 10-12). It is further established that plaintiff first discovered the alleged infringements of defendant in February of 1969 and that correspondence

was begun with defendants to seek voluntary cessation of the alleged infringements. Suit was initiated in early 1970. In the light of plaintiff's expanded use of the trademark and its concern for protecting the mark over the past few years, the mere allegation in Paragraph 17 of defendant's answer, not argued here by defendant despite defendant's motion for summary judgment, is insufficient to support the defense.

(C) Standing to sue

Defendant raises the standing issue on the basis of the fact that the Patent Office records indicate that plaintiff assigned the trademark "Safari" to Swanie-braii, Inc. However, assignment agreement dated January 9, 1964, recorded with the Patent Office February 6, 1964, makes it clear that the assignment covered only grills and recipe books, and not hats or shoes (which are the specific infringements pointed to here) nor any other of the numerous products for which plaintiff holds trademark registrations.

The Certificates of Registration are "prima facie evidence of * * * registrant's ownership in the mark * * *", 15 U.S.C.A. Section 1957(b), and the burden is on the party contesting such ownership to prove that it does not exist. Aluminum Fabricating Co. of Pittsburgh v. Season-All Window Corp., 259 F.2d 314 (2d Cir. 1958). As a matter of law, on the record before us we find that defendant has not met its burden of showing plaintiff's lack of ownership.

[662] 2. See Oxford Universal Dictionary, Random House Dictionary, and Webster's Third International (Merriam-Webster) Dictionary.

[662] 3. Indeed, the Patent Office has issued a number of trademark registrations for the use of the word "Safari" in connection with a series of other products; soap, perfume, fur, skins, hides, pelts, camp beds, house trailers, fountain pens, and flashlights. (See affidavit of Richard H. Wels, sworn to March 30, 1970, and exhibits attached being registration forms for such trademarks). These are held by persons other than the parties here.

[662] 4. Plaintiff has contended that under 15 U.S.C.A. Section 1052 (f) its previous five years of use is prima facie evidence of the emergence of a secondary meaning. The statutory provision states, however, that "[t]he

Commissioner may accept" this meaning, not that either the Commissioner or this court must do so.

[662] 5. See Paragraph 6 of the Complaint.

[663] 6. Defendant has also used the phrase "Safari Clothes from Safari Country." This use is not specifically complained of, although Paragraph 6 of the Complaint sets forth plaintiff's ownership of Registration No. 703,279 of 8/23/60 for "Woven cloth sporting goods apparel." Whether plaintiff can establish a secondary meaning in its application of "Safari" to such apparel remains to be seen. On further proceedings in this case, plaintiff must be specific as to what uses are alleged to infringe. Defendant indicates that its use of the phrase "Safari Clothes from Safari Country" is purely descriptive and refers to "Kalahari clothing manufactured in Africa for use on safaris." Whether this is so must be determined at trial.

[665] 7. The shoes as to which plaintiff has registered the trademark "Safari" include the "Safari Oxford" (a cotton cover shoe) and the "Safari Kahn Oxford" (leather topped). Defendant retails as "Safari Shoes from Safariland" a "Safari Chukka" (a boot-like shoe of leather), a "Hippo Safari" (a shoe of hippopotamus suede), and a "Camel Safari Chukka" (a boot-like camel hide shoe). Defendant's use of the word "Safari" as to shoes is not purely descriptive, and if plaintiff establishes a secondary meaning as to shoes it is entitled to relief.

[665] 8. Where there remain no genuine issues as to material facts in a suit for trademark infringement, summary judgment is appropriate. Alladin Plastics, Inc. v. Jerrold Stephan Co., 362 F.2d 532, at 534 (9th Cir. 1966), there construing Rule 56(e) F.R.Civ.P. Plaintiff's reliance on Marcus Breier Sons, Inc. v. Marvlo Fabrics, Inc., 173 F.2d 29 (2d Cir. 1949), does not compel a contrary conclusion. Also, unlike Sanitized, Inc. v. S. C. Johnson & Sons, Inc., 23 F.R.D. 230 (S.D.N.Y. 1959), or Sterling Products Corp. v. Sterling Products, Inc., 45 F. Supp. 960 (S.D.N.Y. 1942), the moving papers here are adequate to provide the factual basis for the determinations made. Recently this Circuit, in Venetiannaire Corp. of America v. A. & P. Import Co., 429 F.2d 1079 (2d Cir. 1970), affirmed "the granting of summary judgment on the trademark infringement claim." In accord are Spencer v. VDO Instruments, Ltd., 232 F. Supp. 735 (D.C. Mich. 1964), aff'd 352 F.2d 784 (6th Cir.

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1965); Blanchard Importing & Distributing Co. v. Societe E. Blancard et Fils, 402 F.2d 797 (Ct. of Customs & Pat. Appeals, 1968); Beef/Eater Restaurants' Inc. v. James Burrough Ltd., 398 F.2d 37 (5th Cir. 1968).

DECISION OF COURT OF APPEALS

Reported 461 F.2d 1044 (1972)

- - - - - - - - X

SAME TITLE

No. 493
Docket 71-1806

- - - - - - - - X

[1040]

Argued Feb. 15, 1972

Decided April 26, 1972.

Suit seeking injunction against defendant's uses of the word "Safari" which plaintiff had registered as a trademark for various classes of goods. Defendant moved for summary judgment on ground that it had not infringed plaintiff's trademark rights in the word "Safari". The United States District Court for the Southern District of New York, Morris E. Lasker, J., 327 F. Supp. 657, entered a partial summary judgment for defendant, and plaintiff appealed. The Court of Appeals, Thomsen, District Judge, held that genuine issues of fact existed which made it improper to enter a summary judgment finally denying even in part the injunctive relief sought by plaintiff.

Reversed and remanded.

Timbers, Circuit Judge, filed a concurring opinion.

Feinberg, Circuit Judge, dissented and filed opinion.

1. Courts 405 (12.1)

Order, which granted in part defendant's motion for summary judgment in trademark infringement suit and in effect constituted a final denial on merits of injunctive relief prayed for by plaintiff as to those uses by defendant of the word "Safari" which the district court found not to violate any trademark rights plaintiff might have in the word "Safari", was appealable as an interlocutory order refusing an injunction. 28 U.S.C.A. Section 1292(a) (1), (b); Fed. Rules Civ. Proc. rule 54(b), 28 U.S.C.A.

See publication Words and Phases for other judicial constructions and definitions.

2. Trade Regulation 722

In action seeking an injunction against defendant's uses of the word "Safari" which plaintiff had registered as a trademark for various classes of goods, genuine issues of fact existed which made it improper to enter a summary judgment finally denying even in part the injunctive relief sought by plaintiff. Fed. Rules Civ. Proc. rule 56 (b), 28 U.S.C.A.

Roy C. Hopgood, New York City (Sandoe, Hopgood & Calimafde, Paul H. Blaustein, New York City, and Richard H. G. Cunningham, Stamford, Conn., on the brief),

for plaintiff-appellant.

Richard H. Wels, New York City (Sulzberger, Wels & Marcus, New York City, on the brief), for defendant-appellee.

Before FEINBERG and TIMBERS, Circuit Judges, and THOMSEN, District Judge.*

THOMSEN, District Judge:

Abercrombie & Fitch Co. (plaintiff) sued Hunting World, Inc. (defendant) in the district court, seeking an injunction against defendant's uses of the word "Safari", which plaintiff had registered as a trademark for various classes of goods.[1] Defendant
[1041] moved for summary judgment under Rule 56(b), F.R. Civ. P., on the ground that it had not infringed plaintiff's trademark rights in the word "Safari". After considering the pleadings, several affidavits and many exhibits filed by the respective parties, and after hearing argument, the district judge filed an opinion, 327 F. Supp. 657 (S.D.N.Y. 1971), and entered an order which included the following provisions: (1) "That the

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* Of the District of Maryland, sitting by designation.

1. The complaint alleges infringements under the Trade-Mark Act of 1946 (Lanham Act), 15 U.S.C. Sections 1051-1127, and Article 24 of the General Business Law of New York, McKinney's Consol. Laws, c. 20, Jurisdiction is founded on 28 U.S.C. Section 1332(a) and 15 U.S.C. Section 1121.

defendant's motion for summary judgment is granted to the extent of holding that defendant's use of the word 'Safari' to describe its safari hat, 'Minisafari' to describe its smaller safari hat, and the further use by the defendant of the coined word 'Safariland' to describe a part of its shop, as a corporate name, and as the name of a newsletter, do not infringe such rights as plaintiff may have in the use of the word 'Safari', and to the further extent of holding that defendant is entitled to use the word 'Safari' to describe those of its products which relate to the practice or cult of safari"; (2) "that summary judgment be awarded to each of the parties against the other in relation to the respective claims of misrepresentation made by each of them"; and (3) "that in all other respects" defendant's motion for summary judgment be denied.

Plaintiff sought and was denied a certification by the district court under 28 U.S.C. Section 1292(b) and Rule 54(b), F.R. Civ. P. It then appealed to this court, relying on Section 1292(a)(1), which reads in pertinent part:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States * * granting, continuing modifying, refusing or dissolving injunctions * *."

For the purposes of this appeal the facts are adequately stated in the opinion of the district court.

327 F. Supp. at 659 et seq.

I

[1] In granting in part defendant's motion for summary judgment, the district court's order in effect constituted a final denial on the merits of the injunctive relief prayed for by plaintiff as to those uses by defendant of the word "safari" which the district court found not to violate any trademark rights plaintiff may have in the word "safari". In these respects the order is appealable as an interlocutory order refusing an injunction under Section 1292(a)(1).

Defendant argues that the order is not appealable, relying on Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 87 S. Ct. 193, 17 L. Ed. 2d 23 (1966), and Western Geophysical Co. of America v. Bolt Associates, Inc., 440 F. 2d 765 (2 Cir. 1971). Those cases, however are distinguishable.

In Switzerland Cheese the Court held that the denial of a plaintiff's motion for summary judgment seeking injunctive relief was not a denial or refusal of an injunction within Section 1292(a)(1) because it did not "settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing - that the case should go to trial." 383 U.S. at 25, 87 S.Ct. at 195.[2] The present appeal

2. See also Chappell & Co. v. Frankel, 367 F. 2d 197 (2 Cir. 1966).

deals with a grant in part of defendant's motion for summary judgment, which was, in effect, a final denial on the merits of plaintiff's request for an injunction as to certain uses of the word "safari" by defendant.

In Western Geophysical this court declined to take appellate jurisdiction under Section 1292(a)(1) where the district court had granted in part motions by a plaintiff and a third-party defendant for summary judgment with respect to portions of several defenses and counter-
[1042] claims raised by the defendant, which portions sought injunctive relief against the movants. The rationale of the decision was that no single counterclaim had been dismissed in its entirety and that the full extent of injunctive relief prayed for by the defendant could still be secured in each of its counterclaims. 440 F.2d at 771. In the present case, however, there are no remaining claims for injunctive relief which would encompass those uses of the word "safari" as to which the district court granted summary judgment in favor of defendant. Even if plaintiff should prevail on the remaining issues, the summary judgment in favor of defendant with respect to certain uses of the word "safari" by defendant would remain in effect.

Although a part of the district court's order is therefore appealable under Section 1292(a)(1), the

scope of appellate review is limited to that part of the order which resulted in a final denial of a major portion of plaintiff's requested injunction. The comments, findings and conclusions of the district court with respect to the issues on which an injunction was not refused are outside the scope of a Section 1292(a)(1) appeal.

II

At the conclusion of his discussion of the issue - "May the word "Safari" alone be validly registered as a trademark?" - the district judge stated:

> "Although 'safari' is a generic word, a genuine issue of the fact exists as to whether the plaintiff has created a secondary meaning in its use of the word 'identifying the source' and showing that 'purchasers are moved to buy it because of its source,' Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694, 697 (2d Cir. 1961); see also American Lead Pencil Co. v. L. Gottlieb & Sons, 181 F. 178, 181 (2d Cir. 1910, Judge Learned Hand). Plaintiff is entitled to establish in the discovery process or on trial its contention that a secondary meaning has been created. Accordingly, summary judgment cannot be granted on this issue." 327 F. Supp. at 662.

Then, in proceeding to discuss the other issue - "May summary judgment be granted on any of defendant's uses of 'Safari'?" - the judge continued:

> "Even though plaintiff has registered 'Safari' as a mark for the products in issue here and the question of secondary meaning remains undecided, '[t]he registering of a proper noun as a trademark does not withdraw it from the language, nor reduce it to the exclusive possession of the registrant which may be

> jealously guarding it against any and all use by others.' Societe Comptoir De L'Indus., etc. v. Alexander's Department Stores, Inc., 299 F.2d 33, 36 (2d Cir. 1962). * *" Id.

The judge then discussed several of defendant's uses of the word "Safari", alone or in compound words. He found that in certain instances defendant uses the word descriptively rather than as a trademark, despite evidence to the contrary, e.g., the letters "TM" after the words "Mini-safari" and "Safariland". He concluded that some of the uses of the word were not infringements, but that a genuine issue of fact exists as to whether plaintiff may be entitled to an injunction with respect to other items, specifically shoes, and granted defendant's motion for summary judgment only in part.

[2] We intimate no opinion as to the ultimate merits of the case. But viewing the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion for summary judgment,[3] we conclude that genuine issues of fact exist which made it improper to enter a summary judgment finally denying even in part the injunctive relief sought by plaintiff.

Reversed and remanded.

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3. See United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed. 2d 176 (1962); Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L. Ed. 2d 142 (1970).

[1043] TIMBERS, Circuit Judge (concurring):

I agree with the judgment of the Court reversing and remanding, and I concur in all respects in the able majority opinion of Judge Thomsen.

Since Judge Feinberg's perceptive dissenting opinion is addressed only to the issue of the appealability of the district court order, I wish to add the following brief observations on that issue, in addition to my complete concurrence in the majority opinion's treatment of that issue.

If the relief sought below by plaintiff had been cast in the form of a claim for preliminary injunction, rather than for summary judgment, then I take it that the court's interlocutory order refusing such injunction quite clearly would be appealable under Section 1292(a)(1). That being so, it seems to me that the order here under review which finally dismissed certain of plaintiff's claims for injunctive relief with respect to the alleged infringement of plaintiff's trademark rights a fortiori is appealable under Section 1292(a)(1). Although other claims for injunctive relief are still pending, the dismissed claims sought relief on a legal theory distinct from the retained claims. I find the instant case to be indistinguishable from Glenmore v. Ahern, 276 F. 2d 525, 545 (2 Cir.), cert. denied sub nom. Tri-Continental Financial Corp. v. Glenmore, 362 U.S. 964 (1960), where our

Court held appealable under Section 1292(a)(1) an order of a district court which had dismissed one count of a multi-count complaint, the dismissed count having sought the same injunctive relief as several other counts but on a distinct legal theory. 276 F.2d at 545-47. In Build of Buffalo Inc. v. Sedita, 441 F.2d 284 (2 Cir. 1971), we held that "[b]y granting the motion of [three defendants] to dismiss (footnote omitted), the district court effectively denied at the same time plaintiffs' motion for a preliminary injunction as against those defendants. (footnote omitted) The resultant denial of an injunction is appealable under 28 U.S.C. Section 1292(a)(1)." 441 F.2d at 286. Further in the same opinion, we observed that "[t]hus, the dismissal against [three defendants] operated as a refusal of a distinct and separate claim for an injunction, for which any other relief that might emerge from the case could never adequately substitute." 441 F.2d at 287. See also Spangler v. United States, 415 F.2d 1242, 1246-47 (9 Cir. 1969); Telechron, Inc. v. Parissi, 197 F.2d 757 (2 Cir. 1952).

In short, the teaching of these cases and others would seem to be that it is the operative facts (whether set forth in one count or multiple counts) giving rise to an enforceable right which constitutes a "claim", Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187, 189 (2 Cir. 1943), and when such "claim" is squared against the relief granted or withheld by the district court's

judgment or order, that determines whether injunctive relief has been granted or refused for purposes of federal appellate jurisdiction. Just recently, the Supreme Court, responding to a challenge to its appellate jurisdiction to consider a direct appeal under the three-judge district court statute, 28 U.S.C. Section 1253 (1970), where the district court did not reach the merits of appellants' claim for an injunction but dismissed for lack of subject matter jurisdiction, in relevant part held:

> "The appellees also note that Section 1253 permits appeals to this Court only from orders 'granting or denying . . . an interlocutory or permanent injunction. ...' They argue that since the three-judge court never considered whether an injunction should be granted an appeal should lie to the Court of Appeals. The three-judge court, however, entered a judgment 'denying all relief sought by plaintiffs.' We therefore have jurisdiction to consider the claims presented." Lynch v. Household Finance Corp., 405 U.S. 538, 541 n. 5 (1972).

Finally, I think Judge Feinberg's dissenting opinion is constructive in flagging the invitation by the
[1044] author of the majority opinion in Glenmore v. Ahern, supra, to reconsider in an appropriate case the appealability issue which was decided there by a sharply divided court more than a decade ago. Western Geophysical Co. of America v. Bolt Associates, Inc., 440 F. 2d 765, 770-71 n. 4 (2 Cir. 1971). After all, of the five active judges who participated in the Glenmore decision, only one is still in active service and he has tendered the invitation

to reconsider. There are now seven other active judges who had nothing to do with Glenmore. I for one would favor such reconsideration in an appropriate case, but I do not believe this is that case. Among other reasons, none of us doubts that the district court here erred in granting partial summary judgment in favor of defendant in view of the genuine issues as to material facts with respect to the secondary meaning of the word "Safari" as disclosed by the affidavits and exhibits which were before the court. And while we differ regarding the appealability of the erroneous order granting summary judgment, I think there is a practical reason for reversing and remanding at this point now that the case is before us: ultimate disposition of this litigation will be speeded up by correcting the district court error now so that in due course when the appeal from the final judgment reaches us there may be at least the possibility of no need for a remand, whereas on the present record there is a certainty of the need for a remand on the issues the district court has summarily decided without a trial.

Accordingly, I concur in all respects in the judgment of the Court and in the majority opinion.

FEINBERG, Circuit Judge (dissenting):

I dissent from the majority opinion because the district court's order is not appealable. In my view, there is no compelling reason in cases like this to justify

abandoning the historic federal policy against piecemeal appeals. Nor can justification be found in the purpose of 28 U.S.C.A. Section 1292(a)(1), which must be our guide rather than the statute's literal language. See Chappell & Co. v. Frankel, 367 F.2d 197, 202 (2d Cir. 1966) (in banc). The clear purpose of section 1292 (a)(1) is to "permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." Baltimore Contractors v. Bodinger, 348 U.S. 176, 181, 75 S.Ct. 249, 252, 99 L.Ed. 233 (1955). Moreover, when Congress amended the original exception to the final judgment rule for the grant or continuance of injunctive relief to add the refusal of such relief, "it seems rather plain that Congress was thinking primarily of the case where erroneous denial of a temporary injunction may cause injury quite as irreparable as an erroneous grant of one." See Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 830 (2d Cir. 1963) (dissent), cert. denied, 376 U.S. 944, 84 S. Ct. 800, 11 L.Ed. 2d 767 (1964). But plaintiff does not, and indeed cannot, claim that it will suffer special or irreparable temporary harm unless allowed to appeal the trial court's order immediately. Any such assertion would be belied by plaintiff's failure to seek preliminary injunctive relief in the district court in the period since the complaint was filed in January 1970.

Plaintiff's suit asks for a permanent injunction against the use by defendant of plaintiff's mark "Safari" on various classes of goods and an accounting from defendant. That suit still remains untried, except that the district judge has limited plaintiff's case as follows: Plaintiff cannot stop defendant from using "Safari" on a safari hat, "Minisafari" on a smaller hat, "Safariland" in the name of its shop and newsletter, of "Safari" on products relating to "the practice or cult of safari." What the latter are we do not know. But we do know that plaintiff still has a case to prove regarding defendant's use of "Safari" on other products, such as shoes. In that sense, and in the absence of any threat of imminent irreparable injury, the situation resembles a pre-trial order limiting the type
[1045] of damages plaintiff may prove e. g., in a contract suit, eliminating lost profits. Cf. Clark v. Kraftco Corp., 447 F.2d 933, 936 (2d Cir. 1971). In such a case, a plaintiff should not be able to appeal the adverse determination until the entire case has been tried, unless there is ground for an immediate appeal under Fed. R. Civ. P. 54(b) or 28 U.S.C. Section 1292(b), not applicable here.[1] The permanent injunction plaintiff seeks has not yet been

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1. Plaintiff did try those routs, but Judge Lasker refused to direct entry of a final judgment under Rule 54(b) or to grant a certification under Section 1292(b), both prerequisites to jurisdiction in this court.

fully and finally granted or denied. Until it is, and in the absence of a motion in the trial court for a preliminary injunction, see Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971), we should not allow the appeal.

Admittedly, this position perhaps conflicts with the reasoning of our decision in Glenmore v. Ahern, 276 F.2d 525 (2d Cir.), cert. denied, 362 U.S. 964, 80 S.Ct. 877, 4 L.Ed. 2d 878 (1960). There we allowed, over strong dissents, an appeal under section 1292(a)(1) from a district court order which dismissed one count of a multi-count complaint. The dismissed count requested the same injunctive relief as did other counts in the complaint but was based on a "distinct legal theory." But one of the principal cases on which the court in Glenmore relied in reaching its decision, Federal Glass Co. v. Loshin, 217 F.2d 936 (2d Cir. 1954), was subsequently overruled by this court in Chappell & Co. v. Frankel, supra, and disapproved by the Supreme Court in Switzerland Cheese Ass'n. Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 87 S.Ct. 193, 17 L.Ed. 2d 23 (1966). Moreover, the writer of the majority opinion in Glenmore, now Chief Judge Friendly, has suggested that "it may be appropriate for us to give further consideration to ... [the appealability question] should it again arise." Western Geophysical Co. of America v. Bolt Associates, Inc.,

440 F.2d 765, 770-771 n. 4 (2d Cir. 1971). In holding that an order granting partial summary judgment against defendant was not appealable under section 1292(a)(1), the court in Western Geophysical distinguished Glenmore on the ground that in the case then before it "no single counterclaim ... had been dismissed in its entirety." 440 F.2d at 770-771.

Thus, the question of appealability in cases such as this is far from closed. Arguably, since the district court's order here did not dismiss a separate "count" of plaintiff's complaint, there is no right to an interlocutory appeal under our cases. That argument, of course, is complicated by the fact that the effect of the trial court's order was to narrow the scope of injunctive relief sought by plaintiff. Cf. Build of Buffalo, Inc. v. Sedita, supra (plaintiffs allowed to appeal where scope of injunctive relief sought was reduced by order dismissing three defendants, but plaintiffs had moved for preliminary injunction); McMillan v. Bd. of Educ. 430 F.2d 1145 (2d Cir. 1970). But aside from such technical arguments, both the policy behind section 1292(a)(1) and considerations of judicial administration, see American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280-282 (2d Cir., 1967), support the conclusion that the order here is not now appealable. The remainder

of this case should be tried promptly and concluded, rather than have it surface in this court in bits and pieces.

DECISION OF HON. SYLVESTER J. RYAN

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SAME TITLE

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RYAN, J.:

This is an action seeking injunctive relief for alleged infringement of plaintiff's registered trade mrk and for unfair competition by defendant. Plaintiff asserts that defendant infringed on its rights to the trade mark "SAFARI" in the clothing or apparel field. This suit was the subject of a comprehensive opinion by Judge Lasker (327 F. Supp. 657), in which he found that certain uses of the word "Safari" in expressions or words coined by defendant did not violate any of plaintiff's rights.

Judge Lasker reserved to plaintiff the right to prove on trial that "SAFARI" had acquired a secondary meaning by plaintiff's use. On appeal, the Court of Appeals for the Second Circuit reversed with a finding that issues of fact existed which precluded summary judgment even as to part of the claims asserted. 461 F. 2d 1040.

Plaintiff was incorporated in 1906 and has been doing a sporting goods business in New York and elsewhere both at retail and through mail order catalogue distribution on a national and international basis. Plaintiff obtained trademark registration for the mark "SAFARI"

originally in 1938 for use on clothing.* Plaintiff has used the mark extensively and has advertised it extensively in its mail order catalogues as well as in well-known newspapers throughout the country.

Defendant was founded in 1965 by Robert M. Lee as a retail sporting goods store in New York City. Its uses of the word "safari", about which plaintiff complains, are:

(a) "SAFARI" in bold type in advertising headings.

(b) "Safari" with quotation marks in text.

(c) "MINISAFARI" (with or without the symbol "TM") for a hat.

(d) Combinations of "Safari" in expressions such as "CAMEL SAFARI", "HIPPO SAFARI", "CAMEL SAFARI CHUKKA", "SAFARI CHUKKA".

(e) "SAFARILAND" (with or without the symbol "TM")

(f) Use of the word in expressions such as "SAFARI SHOES FROM SAFARILAND", or "Safari clothes from Safari Country".

(g) Use of the name "Safariland, Ltd." for a related corporation.

* The 1938 registration was applied to men's jackets, coats, trousers, breaches, shorts for outer wear, caps, hats and helmets, women's coats, skirts for outer wear, trousers, breeches and hats. A 1957 trademark was obtained for men's and women's skirts, shoes, belts, fishing vests, wading jackets and men's swim trunks. A 1960 registration included woven cloth sporting goods apparel such as pants, shirts, skirts, dresses, sweaters, jackets, coats, raincoats, gloves, scarves, ties, socks and underwear.

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(h) Use of the word "Safari" prominently in connection with defendant's advertising.

The president of defendant has for years been involved in expeditions in Africa and elsewhere, commonly designated as safaris. He was the author of a book published in 1959 entitled "Safari Today - The Modern Safari Handbook". In connection with organizing expeditions, he has published "Safariland News" since at least 1961. A section of defendant's store is described as "Safariland".

The word "safari" is an ordinary , common, descriptive, geographic and generic word, which has been adopted into the English language, used and understood to refer to a journey or expedition, particularly to Africa, for hunting or exploration. The use by defendant of such expressions as "minisafari" to designate a small model of an actual safari hat; "Safariland" to refer to a section of its store or to designate its trade newsletter; "camel safari", "Hippo safari", "Safari chukka", to describe its shoes and boots; is a purely descriptive use to apprise the public of the type of product by referring to its origin and use. It matters not that the hat or shoe may not be used actually on safari by the purchaser or that it is not fit for a safari. In fact, plaintiff's "Safari" shoes and hats admittedly were not fit for a safari; the shoes looked like sneakers and the hat was

a fishing hat.

It is to be noted that defendant's hats and shoes were made in Africa and that the boots were expressly made for safari expeditions.

Moreover, the evidence showed that the word "safari" in connection with wearing apparel is widely used by the general public and the people in the trade.

There was evidence that at least fifteen prominent clothing stores had used the word to describe all sorts of wearing apparel and it is significant that plaintiff itself had used the word in its advertising catalogues in a purely descriptive sense to describe items clearly not covered by its registration, when it designated a Christmas shopping trip as a "Christmas Gift Safari" and referred to "The Supreme Safari" and to gifts as a "Gift Safari".

Although there was evidence that plaintiff had attempted to police some of these uses by people in the trade, there continued to be widespread use of the word and plaintiff was unable to control it. Admitted ignorance on the part of these users of plaintiff's claimed trademark is eloquent proof of the weakness of the mark and establishes the complete absence of any secondary meaning in it.

In his opinion, Judge Lasker ruled that plaintiff's trademark was a "weak" mark and, as such, was not entitled to strict enforcement unless it had obtained a

secondary meaning from plaintiff's use.

After hearing the evidence, I go further and do now find that the mark is invalid because it is merely descriptive and does not serve to distinguish plaintiff's goods as listed in the registration from anybody else's. Bassett Co. v. Revlon, Inc., 354 F. 2d 868 (C.A. 2, 1966); Feathercombs v. Solo Products Co., 306 F. 2d 251 (C.A. 2, 1962); Safeway Stores v. Safeway Properties, Inc., 307 F. 2d 495 (C.A. 2, 1962). Besides widespread use by plaintiff on other products and in other senses to describe the source or type of its goods and services, and its inability to control its use by others, have caused it to lose any identification it might have had originally with plaintiff's goods (although there was no proof of this) and a total loss of rights in it (15 U.S.C. 1064(c)(e), 1127; DuPont Cellophane Co. v. Waxed Products Co., 85 F. 2d 75 (C.A. 2, 1936).

Under the statute, a descriptive name may be protected only if it has through use become identified with plaintiff as its producer, rather than with its products. 15 U.S.C. 1052 (e)(f).

There has been absolutely no evidence of any confusion, any palming off or any injury to the public or to plaintiff from defendant's use of the name "safari" in any of its uses. The evidence of a widespread use of the word by the public and the present competition

belies identification with any particular person. The trial proof showed that plaintiff's competitors, far from attempting to benefit from plaintiff's name and reputation, were genuinely surprised that plaintiff had registered the name and had claimed trademark significance.

No claim of copying by defendant is made. On the contrary, defendant has its own mark "Hunting World, Inc." and asserts its own fame in the market. Moreover, the hats and shoes produced by plaintiff differed significantly from that produced by defendant. In the absence of any confusion, there is no legal right in plaintiff to attempt to appropriate a mark. Venetianaire Corp. of America v. A & P Import Co., 429 F. 2d 1079; King-Seeley Thermos Co. v. Aladdin Industries, Inc. 321 F. 2d 577 (C.A. 2, 1963).

I find and conclude that the mark is invalid, that it belongs in the public domain, and direct that its registration be cancelled. 15 U.S.C. 1119; Feathercombs v. Solo, supra.

Plaintiff complains, and the Court of Appeals noted defendant's use of the name "safari" in a trademark sense rather than in a purely descriptive sense in conjunction with its "minisafari" hat and its department "Safariland", which were followed by the letters "T.M." or "R.".

In this action, defendant's defense was that plaintiff's trademark is invalid and not infringed because (a) safari is a purely descriptive word, which is not a valid trademark, or (b) because, despite registration, there is a perfect defense of "fair use" when the mark is used "only to describe to users the goods or services of such party, or their geographic origin." 15 U.S.C. 1115 (b) (4).

On trial, defendant's president testified that he had designed the "minisafari" hat and that he considered it his name and had applied for but had not obtained registration for it as a trademark.

I agree with Judge Lasker that the name "minisafari" is literally descriptive of a small safari hat and, as such, would not be entitled to registration. As for "Safariland", defendant claimed exclusive use only in connection with its store but testified that it had not applied for registration. It made no claim to the exclusive use of the name "Safariland" in its newsletter.

There was no testimony or evidence to show that either or both of these names used with the hat or store had become so closely identified with defendant as to entitle it to registration on the ground of secondary meaning. 15 U.S.C. 1052 (f).

It is clear that the defense of descriptive use

of the goods does not apply to the use of these names followed by "T.M." or "R.". It is also clear that defendant, in using these letters "T.M." or "R." without benefit of a registered trademark, is misleading the public and attempting to frighten the competition. It will be enjoined from doing so until a registered trademark, if any, issues; whether such a mark would be valid is not before me.

Accordingly, defendant is entitled to judgment on its counterclaim dismissing the complaint on the merits and to a decree cancelling plaintiff's trademark "Safari"; plaintiff is entitled to a decree enjoining defendant from the use of the letters "T.M." and "R." after "Minisafari Hat" and "Safariland".

The foregoing constitute my findings and conclusions. Submit a judgment accordingly.

Dated: New York, New York
September 30, 1974

s/S. J. Ryan
U.S.D.J.

ORDER ON MOTION FOR RECONSIDERATION

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SAME TITLE

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Upon the record and file herein and on consideration of all proceedings heretofore had, it is ordered that:

1. Plaintiff's motion for reconsideration by the Court of that portion of the judgment entered herein cancelling plaintiff's trademark "Safari" is denied; and

2. Defendant's judgment cancelling plaintiff's United States Trademark Registration Nos. 358781, 125531, 652098 and 703279 for "Safari" and plaintiff's New York Registration No. R-8008 for "Safari", and all other of the plaintiff's United States and individual State trademark registrations for "Safari", has been signed and said registrations are cancelled in toto.

Dated: October 9, 1974

s/S.J. Ryan
U.S.D.J.

Filed October 10, 1974

JUDGMENT

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SAME TITLE

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This action came on to be tried before the Court, Honorable Sylvester J. Ryan, United States District Judge presiding, and the issues having been duly tried, and a decision having been duly rendered and filed, dated September 30, 1974, it is

ORDERED, ADJUDGED AND DECREED, that the complaint herein be and the same hereby is dismissed on the merits, and it is further

ORDERED, ADJUDGED AND DECREED, that the plaintiff's United States trademark registrations Nos. 358,781, 125,531, 652,098, and 703,279 for SAFARI, plaintiff's New York Registration No. R-8008 for "SAFARI", and all other of the plaintiff's United States and individual State trademark registrations for "SAFARI" be and they hereby are cancelled, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant be, and it hereby is, enjoined and restrained from the use of the letters "T.M." and "R" after the terms "Mini-safari Hat" and "Safariland".

s/Sylvester J. Ryan
United States District Judge

Dated: New York, N.Y.
October 8th, 1974

Judgment Entered 10/15/74

NOTICE OF APPEAL

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SAME TITLE

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TO: Clerk of the Court
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Abercrombie & Fitch Company appeals to the Court of Appeals of the Second Circuit from the Judgment of the Court below entered October 15, 1974 in the above case.

Respectfully submitted,

By s/Paul H. Blaustein
Paul H. Blaustein
Hopgood, Calimafde, Kalil,
Blaustein & Lieberman
Attorneys for Plaintiff
60 East 42nd Street
New York, N.Y. 10017

Dated: New York, N.Y.
November 7, 1974

RICHARD WELS
18 East 48th St
N.Y.C., N.Y.

H E N R Y C. G E I S, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

MR. HOPGOOD: Your Honor, before asking questions of Mr. Geis, I would like to mark and have received in evidence as Plaintiff's Trial Exhibits the registrations which are -- pardon me -- certified copies of the registrations which are recited in the complaint.

THE COURT: Take them in chronological order.

MR. HOPGOOD: Of course.

THE COURT: The earliest one now? How many do you have?

MR. HOPGOOD: That poses another problem. Why don't we take just the ones that are straight Safari first, and they will be chronological.

THE COURT: It would be preferable if you would put all of your certificates of registration in chronological order, all that you maintain are involved in this case, and then offer them in evidence and we will mark them Plaintiff's Exhibits 1, 2, 3, 4. I don't assume there will be any objection, and we will take them in evidence and get them out of the way and we will know what we have to start out with.

(Pause.)

MR. HOPGOOD: Next, your Honor, I have New York State trademark registration #R-8008, dated June 30, 1964, certified by the Secretary of STate of New York State. I would like to have that marked as the next exhibit.

(Plaintiff's Exhibit 8 was received in evidence.)

MR. HOPGOOD: I would like to have the exhibits just marked received in evidence. Have they been received?

THE CLERK: They have been received in evidence.

DIRECT EXAMINATION

BY MR. HOPGOOD:

Q Mr. Geis,would you please --

MR. WELS: You are not putting in the rest of them, Mr. Hopgood?

MR. HOPGOOD: What do you mean?

MR. WELS: There are other registrations.

MR. HOPGOOD: I am going by what is in the complaint.

Q Mr. Geis, would you please state your position, your age.

A Well,I am 52 years old, currently I am vice-president, secretary, and treasurer of Abercrombie & Fitch.

Q How long have you been associated with Abercrombie & Fitch?

A My employment with the company commenced in 1955. At that time I was assistant treasurer.

Q Had you previous contact with the company?

A Oh, yes. Since 1944 for a period of a few years I was engaged in the public accounting business. I worked for Haskins & Sells, certified public accountants, and at that time I worked on the ABercrombie audit as a junior, a semi-senior and finally as a senior, and then in 1955, I went from Haskins & Sells to Abercrombie as assistant treasurer of the corporation.

Q Then is public accounting your field of background?

A Yes. I have been in it for 30years, both public and private, holding a New York and New Jersey State certificate as a CPA.

Q What are your responsibilities in your present position?

A Currently, I am in charge of the general financing of the corporation. As the treasurer, I am responsible for the preparation of the monthly financial statements, and also the annual report.

I file all the tax returns for the corporation and its subsidiaries. I also prepare reports for SEC, 8(k), 10(q0, 10(k), as required, and also as corporate secretary,

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handle the annual meetings, the shareholders' meetings, and in that connection, function as the legal liaison between Abercrombie & Fitch and either the general corporate counsel or, in this particular case, the specialized counsel handling trademark matters, so that I handle the legal matters for the corporation as a layman and when an attorney is hired, I handle that part of it, conferring with the attorneys.

Q How long have you had such responsibilities?

A Since approximately 1967 or 1968 I have been handling this legal liaison responsibility. My accounting responsibility goes back to 1955.

Q Was there a predecessor for you insofar as these responsibilities you describe in the area of trademarks?

A Yes, prior to 1967 or '68, a vice-president of the company who subsequently left the company, by the name of George C. Speh, handled the trademark matters for the corporation.

Q Did you inherit his files?

A And when Mr. Speh left employment with the company, I took over the trademark responsibilities.

Q I would like to have you state for the record an overall view of the scope of Abercrombie & Fitch, the nature of its business, the geographical extent, how the business is done.

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A Yes. Well, Abercrombie & Fitch has its principal store up on the corner of Madison Avenue and 45th Street. That is a fairly large store for that type of specialized business. It is an 11-story building. We occupy the entire 11 floors and use 10 of the 11 floors for selling.

THE COURT: Do you own the building or is it leased?

THE WITNESS: We happen to own that building. A subsidiary of Abercrombie owns the building and leases it to Abercrombie.

Now then, we have another principal store in Chicago on Wabash Avenue. That store is about one-half the size of Abercrombie & Fitch. That is a leased building.

We also have another main store in SanFrancisco, again, that is about half the size of the Chicago store. And that is a leased building.

In addition to those three main stores, as we classify them, we have a few other smaller stores. We have a store in Oakbrook Shopping Center which is a suburb of Chicago.

We have a store in the Broadmoor Hotel outside of -- or in Colorado Springs.

We also have a store, small store in a shopping center inTroy, Michigan.

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We have a small store in Short Hills, New Jersey.

We also have two stores in Florida, one in Bal Harbor and another in Palm Beach.

In addition to those stores, we operate a rather extensive mail order business, which is operated from our New York store, and warehouse complex.

Q You indicated that the business is somewhat specialized. Can you name that specialty?

A Well, it is specialized in that it is primarily geared to merchandise for the sportsman, for outdoor, like leisure wear, so it is not a broad department store, and in addition, I think it is also specialized because it is a quality house. We do not attempt to get business by offering specials or bargains, etc,, so that I think the distinction --

THE COURT: You had a big bargain recent ly, didn't you, a sort of clean out sale about a year ago?

THE WITNESS: Yes, I think that once in a while we have to get rid of some merchandise, but I can assure you the price of our merchandise generally is not one that would attract people there because it is inexpensive or cheap.

Q Is clothing a part of that business?

A Yes, clothing represents in rough percentage a little over 50 per cent of our business. That is men's

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clothing, women's clothing, and shoes taken as a group, it would be over 50 per cent of our business.

Q You mentioned the department stores. I forget whether you mentioned any other area in which you do business or method in which you do business. Did you mention --

A Are you referring to mail order business?

Q Well, please tell us about that.

A Yes, we have an extensive mailorder business. Our mail order customers, as carried in our files, the customers to whom we mail catalogs three or four times a year, come from, I can say, practically every state in the union, and in addition to that, we have a number of customers in quite a few foreign countries.

So that despite the fact that Abercrombie is small in terms of total business that the store does, I think it is fair to say that because of the spread of business it does, it is known not only nationally but to a great extent internationally.

Q Do you have any figure for the volume of these catalogs that are sent out?

A Yes.

Q Per issue?

A Over the last ten or fifteen years we have consistently sent out three or four catalogs per year.

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There may have been an instance where we sent more than four but I think four would be the most we sent in a year. Generally, the catalogs are sent out, one in early spring, one in April, another catalog is sent out in the fall, and then in turn, our Christmas catalog, which would get out some time in October.

Those are the four principal catalogs that we run and have been running consistently.

Q By "volume" in my question, I was seeking some idea of the numbers that go out.

A Our catalog list will vary but it is consistently somewhere in the area of 400,000 to 480,000 during this entire span of time we have some reference to. Thus if we talk about four catalogs a year, you would be talking about a million eight, perhaps even slightly more catalogs that might be sent out in a year.

THE COURT: What means of distribution do you use for these catalogs?

THE WITNESS: The mail. The mail. Mail. We also give them out at the store, but I would say 90 per cent of them are sent out by mail.

Q Are they sent to charge account customers?

A Well, we send a charge account customer every catalog.

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In addition, we send cash customers who have given their name at the store, either because they are having the merchandise shipped or because they insist upon giving their names so that they can get on the list, we send these cash customers a catalog also.

In addition, we get numerous requests for catalogs from customers that are not on our list and we send those out also.

Q You mentioned, I believe, sporting goods as an identification or image for the company.

Can you state something about the history of the company as you know it from company records? When was it founded and what was its nature and so on?

A Yes. The history of course is before my time. It goes back to 1892, at which time two gentlemen by the name of Ezra Fitch and another one David T. Abercrombie established or organized a sporting goods business.

They were primarily sportsmen and had the interest of collecting sporting equipment and making it available to the public, and so they operated this business downtown New York. I don't recall what street it was on for a few years.

Subsequently, in 1904, the business was formally incorporated under the State of New York and has operated

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since 1904 as a corporation, Abercrombie & Fitch Company.

In 1917, Abercrombie moved from, I believe, 36th Street or some street other than its present location, to the building it now occupies at 19 East 45th Street or 360 Madison Avenue.

Q Did you indicate the number of floors in the building?

A Yes, there are 11 floors in the building, plus a basement, of course.

Q Are they used for retailing?

A Ten floors are used for retailing. The 11th floor is primarily office space and storage, etc.

Q I believe you mentioned clothing was important for men and for women. Are they on separate floors?

A Yes. We have two floors in our store in New York, the second and third, that are devoted to women's wear, and in turn, the fourth and fifth floors are devoted to men's wear.

Q Then the assignment of floors is roughly the proportion you indicated for the volume that clothing bore to the rest of the business?

A Yes, there would seem to be the same proportion of space as to dollar business done by these divisions.

Q Is there any image or slogan that you identify

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with the store over the years?

A Yes, over the years the store has used the slogan "The Greatest Sporting Goods Store in the World." And I think that Abercrombie has fulfilled that place in the market for unusual and practical quality sporting goods items and furnishings.

Q Do you have knowledge of the trademark Safari in connection with the business and your responsibilities?

A Yes, sir.

Q How long have you had that knowledge?

A Well, I have known that Abercrombie has had trademarks since 1955, but my direct involvement in terms of handling the trademark responsibility for Abercrombie goes back to about 1967 or 1968.

Q I will show you the registrations which have been marked as Exhibits 3, 5, 7, and 8, and ask if the recitation of goods in each of these accords with your understanding of the use of the mark Safari by Abercrombie & Fitch.

MR. WELS: Could you clarify that question, Mr. Hopgood? I don't understand it.

MR. HOPGOOD: I thought it was a clear question, but I don't mind.

THE COURT: Don't carry on a colloquy. I think the question is plain. Did you manufacture articles

which are listed in those exhibits, or merchandise them?

THE WITNESS: Merchandise them, yes.

MR. HOPGOOD: I didn't ask whether they manufactured, your Honor.

THE COURT: I asked. I want to find out whether they used these marks. He says they have them. They marketed them. Were they marketed under that name?

THE WITNESS: Yes. That is right. I am just checking the registrations to make sure.

I can state for the record that the products recited in these registrations are the products that have been sold under the name Safari by Abercrombie & Fitch for the period we are talking about.

MR. HOPGOOD: Your Honor, I would like to have the witness identify certain representative articles and their markings. I would like to have them marked as exhibits.

THE COURT: You don't want to bring in specimens of all these articles, do you?

MR. HOPGOOD: I am not doing the entire business. I do believe it is necessary that I --

THE COURT: You try your case any way you think it is necessary to do it. I personally don't think it is necessary, but if you feel so, go ahead. I want to keep

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down the exhibits if we can. Do what you want. One of the trademark registrations is the registration of a label. Is that a label that was put on each one of these articles that were marchandised?

THE WITNESS: Yes, the articles that we are talking about do have this label attached to them.

THE COURT: I say one of the registrations has a label reproduced. Show him those exhibits, please.

Q Did you, Mr.Geis, direct --

THE COURT: No, will you please give him the exhibits.

MR. HOPGOOD: I am sorry. I didn't understand that.

THE COURT: I want him to look at that and you will notice that one of these registrations, I think it is Plaintiff's Exhibit 3, has what apparently is a garment label.

THE WITNESS: This is a reproduction of that ladies wear we are talking about.

THE COURT: It is right in the registration. Was that label as reproduced in your copyright registration, was that affixed on the articles that you sold at your store?

THE WITNESS: That's right.

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THE COURT: You say you didn't manufacture these articles yourself.

THE WITNESS: No, there is one article we do manufacture in our tailor shop, but the great bulk of them we have manufactured by another source.

THE COURT: Does anybody else get that or do you have an exclusive on it?

THE WITNESS: No, we sell the merchandise with the Safari label only at our stores.

THE COURT: All right. Although the article is sold generally in the public, the articles that are sold in your store have your label on them?

THE WITNESS: That's right.

THE COURT: But you do not have -- these are not made up to your special design and specifications, are they?

THE WITNESS: In some instances they are. I think if this might be of interest to describe the situation, I could cover that. I want to keep it brief.

THE COURT: I would like to know whether or not these are articles which you have had made or have made yourself, and whether or not these articles are exclusively sold by you in your various stores with this label attached?

THE WITNESS: Right. Your Honor, all of the Safari articles that are sold in our store have a Safari

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label attached. While we do not manufacture them ourselves, we do have very close relationship with the manufacturer of this article.

I would state that the design of the shirts or the jackets in most instances or many instances represent a combination of design by our merchants and the manufacturer.

Obviously, certain standard manufacturing techniques are required, but we want to make sure that this merchandise is fit for a particular use, so that when we have a Safari shirt, one of the requirements of the shirt is that it have a large pocket because people are using it for an outdoor use, and it is that type of detail that we are very insistent that goes into the shirt.

THE COURT: Now, Mr. Geis, you are not answering my question. The same garment that you sell in your stores on which you put your label is also sold by other people without your label, is that correct?

THE WITNESS: I couldn't say that the same article in every detail is sold by other stores. I would say that similar articles are sold. I am not that much of an expert that I could distinguish some of these minor differences in manufacturing.

THE COURT: All right.

Q Mr. Geis, are the articles you have been talking about, these articles of clothing that are sold not only in the stores, but also through the mail order business?

A That is correct.

MR. HOPGOOD: First I would like to mark and identify a box of shoes. The box has a marking.

THE COURT: You offer this in evidence?

MR. HOPGOOD: I would like to, your Honor.

THE COURT: All right, Exhibit No. 9.

MR. HOPGOOD: So we call the box itself 9 and the shoes.

THE COURT: Call the box and contents 9.

MR. HOPGOOD: All right.

xxx

(Plaintiff Exhibit 9 was marked in evidence.)

THE COURT: What are they, a pair of Keds?

MR. HOPGOOD: Your Honor, I believe Keds is a trademark of somebody else and I would hesitate to call them Keds.

THE COURT: I know sometimes it is a trademark. Sometimes it isn't.

Q Mr.Geis, I show you Exhibit 9 and direct your attention to marking on the box. What is the writing on the box?

A Women's Safari oxford.

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Q Do you find that the shoes also have a mark?

A Yes, there is Safari label on the heel of this.

Q And the label has an R in a circle?

A That is correct.

THE COURT: There was no objection, was there?

MR. WELS: No objection.

Q Mr.Geis, do you remember going with us in the store yesterday to pull out a representative collection of Safari garments and hats?

A Yes, it is reposing on those chairs.

Q Let's take hats.

MR. HOPGOOD: Your Honor,I would like to mark each of these hats and for convenience I have some string tag labels.

THE COURT: Put them on and we will know what they look like.

MR. HOPGOOD: First I have a hat. I would like to know what we call it. It is a round hat which is soft.

(Plaintiff's Exhibit 10 was received in evidence.)

Q Mr. Geis, do you find in that hat a label marked Safari?

A Yes, there is a label here.

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Q You have a way of describing what kind of hat that is, only if you know?

A Not really other than it is a -- what we call a Safari hat that is used for general outdoor sportswear, leisure wear.

THE COURT: Was it made in Germany? They are made here?

THE WITNESS: I think they are made here.

MR. WELS: I have no objection to this one.

(Plaintiff's Exhibit 11 was received in evidence.)

Q Plaintiff's Exhibit 11 is another hat with a shiny black long visor. Do you find a mark Safari on that one?

A Yes, it is on this one also.

Q What kind of a hat is that one, if you know?

A This is a cap that would be used for fishing or outdoor use.

(Plaintiff's Exhibit 12 was received in evidence.)

Q I show you another hat marked Exhibit 12, Mr. Geis, and ask you if you find the mark Safari in that?

A Yes, there is a Safari label in the center of this hat.

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Q What kind of a hat is that, if you know?

A I don't know the technical name of that hat.

Q It has got little vents off to the side.

A That would be used for fishing or outside wear.

xxx (Plaintiff's Exhibit 13 was received in evidence.)

MR. WELS: No objection.

Q I show you another cap, Mr.Geis, with a shorter visor. Do you find the mark Safari in there?

A Yes, there is a Safari label in this cap also.

xxx (Plaintiff's Exhibit 14 was received in evidence.)

Q Lastly, Mr. Geis, I will show you a hat marked Exhibit 14. Do you recognize that as a product of Abercrombie & Fitch marked Safari?

A Yes, this is a Safari hat, snap brim, Aussie hat.

Q Aussie, is that the kind of hat it is, an Aussie hat?

A That's right.

MR. WELS: What was that? I didn't get that?

THE WITNESS: Aussie snap brim hat.

Q Where was the mark? Is that under the mosquito netting?

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A I took the mosquito netting out. It is underneath the mosquito netting.

MR. WELS: No objection.

(Plaintiff's Exhibit 15 was received in evidence.)

Q Mr. Geis, I shall show you a garment marked Exhibit 15, and ask if you recognize that as one of the offerings of Abercrombie & Fitch.

A Yes, this garment is a coulotte, and it has the Safari label in.

Q In the belt?

A In the belt.

Q In the belt line?

A Inside, in the belt line.

Q That label, do you recognize that label?

A That is a Safari label.

Q Is that like the one that showed up in that registration, New York State registration?

A That's the label.

Q Exhibit 8.

A Yes.

(Plaintiff's Exhibit 16 was received in evidence.)

MR. WELS: Would you describe what that is.

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Mr. Hopgood?

MR. HOPGOOD: I am not the expert. I will get Mr.Geis if he can. I would like the record to show what these are.

Q Mr.Geis, I will show you a pair of pants with bright red lining, looks like quilted lining, and ask you can you recognize that aspart of the Safari line? It is marked Exhibit 16.

A Yes, sir.

Q Do you find the label Safari in there?

A Yes, the Safari label is in here. This is a pair of trousers that would be used for hunting. It is quilted lined so that it is a warm garment for outdoor use.

Q Again, is the label that you have just identified similar to that which appears in the registration, New York State registration Exhibit 8?

A Yes, similar label.

(Plaintiff's Exhibit 17 was received in evidence.)

Q Mr. Geis, I will show you what looks like a pair of slacks just marked Exhibit 17, and ask you if you can identify that as an article sold by the store.

A Yes, this is a pair of ladies' slacks with the

Safari label sewn into the garment.

Q Again like in that New York State registration?

A Same type.

xxx (Plaintiff's Exhibit 18 was received in evidence.)

Q I show you a shirt, Mr. Geis, which has been marked Exhibit 18 and ask if you can identify that as also within the line of products you are talking about.

A Yes, this is a men's Safari shirt, and has the Safari label in the collar and the label is similar to the one reproduced on the registration.

Q Did you identify the label in this Exhibit 18?

A Yes, that's right. The label in the shirt is the same as reproduced on the registration.

Q Exhibit 8.

A Yes.

xxx (Plaintiff's Exhibit 19 was marked for identification.)

Q Next I will show you some short pants marked Exhibit 19 and ask you if you recognize those as within the line.

A Yes, this garment here is ladies' short pants. It is Safari label sewn into the pants and it is the same label as reproduced in the registration statement we have

been referring to.

(Plaintiff's Exhibit 20 was received in evidence.)

Q Next, Mr.Geis, I show you some sort of vest which has been marked Exhibit 20. Can you say what that garment is and whether it is within the line you have been testifying about?

A Yes, this garment is a ladies' shooting vest with padding at the shoulders to prevent the recoil injuring the shoulder.

It is a Safari label in -- sewn in the garment and it is the same Safari label that is reproduced in the registration.

(Plaintiff's Exhibit 21 was received in evidence.)

Q Next, Mr. Geis, I will show you a short-sleeved shirt which has been marked Exhibit 21. Can you identify that within the line you have been testifying about?

A Yes, Exhibit 21 is a short sleeve ladies' shirt, also identified as Safari and has the Safari label sewn into the garment.

It is the same label as reproduced in the registration.

(Plaintiff's Exhibit 22 was received in

evidence.)

Q Next, Mr.Geis, I will show you a heavier garment, long-sleeved, and darker. It is marked Exhibit 22. Do you recognize that within the line you are talking about?

A Yes. Exhibit 22 is a ladies' light-weight jacket and is identified as a Safari jacket with the label Safari sewn into it. The same label as we have been referring to on all these other exhibits reproduced in the registration.

Q I notice that it has a darker color.

A That's right. Most of the Safari articles that we sell are of a light shade that we have handled here before. We do have some also in this dark color.

The other sand color is more numerous than this particular shade.

Q So Exhibit 22 is typical of another color?

A Color, that's right.

Q And is in the same kind of goods?

A That's exactly right.

(Plaintiff's Exhibit 23 was received in evidence.)

Q Mr. Geis, I hand you another vest which has been marked Exhibit 23 and ask if you can say what that is, and is it within the line you have been testifying about.

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A This vest is designed for hunting or fishing, I am not quite sure. I am not a hunter or fisherman. It has got large pockets in the vest for that purpose, and it is identified as a Safari garment and has sewen in it the label that has been reproduced in the registration.

Q Is that a men's garment or ladies' or doesn't it matter or can you tell?

A This is a men's garment.

THE COURT: You ought to be able to tell the difference between a ladies' garment and men's garment.

MR. HOPGOOD: He has identified several as ladies.

THE WITNESS: This is a men's vest.

(Plaintiff's Exhibit 24 was received in evidence.)

Q Mr. Geis, I have another jacket which has been marked Exhibit 24. Can you identify that within the line? It has a belt on it.

A Well, this is a men's light-weight Safari jacket, short sleeves, and has the Safari label sewn into it, the same Safari label that is reproduced in the registration.

(Plaintiff's Exhibit 25 was received in evidence.)

Q Next, Mr. Geis, I show you a ladies' skirt

marked Exhibit 25. Can you identify that as within your line?

A Yes, this is a ladies' skirt and is identified as a Safari garment and has the Safari label which has been reproduced in the registration sewn into the garment.

xx (Plaintiff's Exhibit 26 was received in evidence.)

Q I just wanted to go back and correct something. I think you may not have realized and I may not have realized it in others where you said the label was the same, but in the registration of Exhibit 8, the sample label that was clipped to the registration shows New York, Chicago, San Francisco.

A Yes.

Q It also has no A & F symbol.

A Yes, the designation Safari is in the same script.

Q It is also the same kind of label?

A Same kind of label, that's right.

Q Although the manner of showing Abercrombie & Fitch or A & F Co. or the addresses may be different?

A That is right. The label had to be changed since we have more than two or three stores that we had when that label was designed.

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Q Mr. Geis, I show you a coat garment which has been marked Exhibit 26. Can you identify that as being within the line of your goods marked Safari?

A That is right. This is, I believe, the technical name of the S.A. Club coat. It is like a suit coat, in effect, a little dressier than the garments we looked at before.

This has the Safari label sewn into the inside pocket and it is the same Safari label that we have been referring to that is similar to what is in the registration.

(Plaintiff's Exhibit 27 was received in evidence.)

Q Next, Mr.Geis, I will show you a lined garment which has been marked Exhibit 27. It has a zipper front. I ask you if you recognize that as within the line.

A Yes, this is a men's heavy-weight lined Safari jacket. Again that has the Safari label sewn into the garment and it is a label similar to the label that is in the registration.

Q When you said it was a Safari jacket, did you mean that it was marked Safari or did you mean something else?

A No, that was marked Safari.

(Plaintiff's Exhibits 28 and 29 were

received in evidence.)

Q I show you another vest, Mr. Geis, marked Exhibit 28. Will you please say what it is?

A It is a shooting vest for men, men's garment, shooting vest, and it has the Safari label sewn into it. The same Safari label as has been in all the other garments here and reproduced in the registration.

Q Now I show you a pair of slacks or trousers, marked Exhibit 29. Do you recognize that also within the line?

A This is a pair of men's slacks and has sewn into the garment the Safari label which has been identified to the other garments and it is the label that has been reproduced in the registration.

MR. HOPGOOD: I might complete this by just putting in a sample of a ribbon of the labels of this sort which go into these garments. It may be an old ribbon but it is the same sort I believe.

(Plaintiff's Exhibit 30 was marked in evidence.)

THE COURT: You can't buy that in any other store, can you?

THE WITNESS: No. If anybody tries to buy it I stop them.

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THE COURT: Who puts the label in your garments that you buy and merchandise yourself? Is that put in by the manufacturer?

THE WITNESS: That is put in by the manufacturer.

THE COURT: You supply him with that?

THE WITNESS: We supply him a number of labels according to the number of garments that we order.

THE COURT: YOu keep special track of that, of the number of labels and the number of garments?

THE WITNESS: Yes, we have a reasonable control. I couldn 't say that we could account for an odd one that might be missing but we keep a reasonable control so it is not used promiscuously.

THE COURT: All right.

Q Do you recognize that string of labels, Mr. Geis, as typical?

A This is the Safari label.

Q You recognize this as typical for your goods that you have been talking about?

A Yes, this is the same label, a little different variety in printing, however, with the stores indicated in this, but it is the same label used on all these garments.

THE COURT: All right, two o'clock, gentlemen.

(Luncheon recess.)

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2:00 P.M.

H E N R Y C. G E I S resumed.

DIRECT EXAMINATION (continued)

BY MR. HOPGOOD:

Q Mr. Geis, before lunch you were talking about catalogs the company issues and mails from time to time.

Does the company also advertise?

A Yes, the company advertises in several magazines and also in several newspapers. To be more specific, New Yorker, Sports Illustrated, Time & Life represent the type of magazine the company has advertised in; and also in the newspaper area, we advertise in the New YOrk Times and Wall Street Journal, and in the Chicago area the Chicago Tribune, and in turn in SanFrancisco area the San Francisco Chronicle.

Those are the principal magazines and newspapers that we advertise in.

Q I would like to have you help us identify some advertisements as being typical, if you can, within the framework of your statement about advertising. I am just taking them from a pile here.

First I have one from Chicago Tribune, January 15,1971.

MR. WELS: What was the date, Mr. Hopgood?

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MR. HOPGOOD: January 15, 1971.

THE COURT: That is after the action was filed.

MR. HOPGOOD: That is right. I have a whole spread of time.

THE COURT: After the action was filed is immaterial. You know that.

MR. HOPGOOD: Allright. Yes, sir.

THE COURT: Why don't you pick out one or two of the earliest ads and some of the more recent ads prior to the filing of the suit. Otherwise, we are going to have an awful lot of exhibits that are not going to have any relevance here. You might as well cut down the exhibits in number. I am not ordering you to do that, but I can't receive now ads which were published after the filing of suit

MR.HOPGOOD: Very good, sir. Here I have one from the New Yorker, Page 100, of the issue of 3/9/63. It has a left-column advertisement for Abercrombie & Fitch.

(Plaintiff's Exhibit 31 was marked for identification.)

THE COURT: What date is that now, this one?

THE CLERK: 3/9/63.

Q I show you Exhibit 31, Mr.Geis. Do you recognize the items in that advertisement for Abercrombie & Fitch

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as coming within the scope of articles that you identified before lunch as bearing the mark Safari?

A Yes, these are articles quite similar to the ones that we have identified previously.

Q What specifically are the articles?

A There is a shirt, Safari cloth shirt and also wading vest, Safari label. Those are the two articles appearing in this advertisement.

Q I have a catalog. I am trying to find the name of it. It has 1969 written upon it. Inside the front page is a copyright notice for 1969. Is this a typical kind of catalog for the company?

A Yes, this is a typical Abercrombie & Fitch catalog.

Q Do you have a name for it? Is this the name, about Page 3?

A Yes, the Big Little Book of Fishing and Camping.

Q For 1969?

A That's right.

THE COURT: Big Little Book of Fishing and Camping?

THE WITNESS: And Camping.

MR. HOPGOOD: It so happens, your Honor, that the title is inside (indicating).

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Q Directing your attention to a page which is not a numbered page unfortunately, but I have put a paper clip on it, do you find on that page articles within the general description of what you identified as marked Safari before lunch?

A Yes, we have here bush jacket, which is identified as Safari, and also the Aussie hat, and there is also trousers, Safari, and a fishing vest labeled Safari.

MR. HOPGOOD: I should have had this marked. I am sorry.

(Plaintiff's Exhibit 32 was marked for identification.)

MR. HOPGOOD: Just that page.

THE COURT: We will receive it in evidence. Do you have any objection?

MR. WELS: No objection. It is being marked for identification?

THE COURT: He wants to introduce them in evidence.

MR. WELS: If he does, I would like to see them before they are introduced.

THE COURT: Yes. You are offering these in evidence, aren't you? All right, 31 and 32 he offers in evidence.

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MR. WELS: May I see them, your Honor?

MR. HOPGOOD: Surely. I am sorry.

THE COURT: Mr. Wels, the defendant does not dispute but that Abercrombie & Fitch, the plaintiff corporation, is well, prominently, and favorably known in the market?

MR. WELS: We do not dispute that at all, your Honor.

THE COURT: All right. And that it advertises on a national basis?

MR. WELS: Well, I don't know about its advertising on a national basis. I am familiar with its advertising in New York, but I don't know anything about the Chicago or San Francisco advertising.

THE COURT: You apparently haven't traveled in that part of the country.

MR. WELS: I have no objection to 31 and 32, your Honor.

THE COURT: All right, received in evidence.

(Plaintiff's Exhibits 31 and 32 were received in evidence.)

MR. HOPGOOD: Next I would like to mark as Exhibit 33 another catalog called The Big Little Book of Fishing, with a copyright date of 1968. I shall identify

xxx

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and have the witness talk about certain pages in this.

THE COURT: You offer this in evidence?

MR. HOPGOOD: I shall, yes, sir.

MR. WELS: No objection.

THE COURT: There is no objection. Received in evidence by consent.

xxx (Plaintiff's Exhibit 33 was received in evidence.)

Q In Exhibit 33, which I show you, Mr. Geis, -- and by the way I am asked would you please speak a little more loudly -- is this another one of your regular catalogs?

A Yes, The Big Little Book of Fishing, 1968 edition.

Q Now the pages in this book are numbered. I direct your attention to Page 112-113, which is a double-page spread. Do you find on those pages articles such as you have been testifying about, articles of clothing marked Safari?

A Yes, there are three on this page. You want me to identify them?

Q Please say what they are.

A Sueded cotton Safari shirt and Safari knock-about and Safari round hat.

Q In every case you were just reading the heading

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for each one?

A Exactly.

Q Now directing your attention to Pages 120 and 121 which is another double-page spread, do you find articles such as you have testified about before?

A Yes, on this page, 121, we have the Safari cap and again an Aussie hat, Safari.

Q Is that Safari cap like one you marked this morning?

A That's right, and the Aussie hat also.

Q And they are depicted on photographs corresponding to the identifying key letters on the left-hand page of this spread, aren't they?

A That's correct.

Q Now turning to Page 129, do you find more? Here we are dealing with women's wear?

A Yes, on 129 there appears to be three items: A Safari bush jacket, a frontier pants, Safari; and culotte dress, Safari.

Q Then lastly, on the double-page spread of Pages 130 and 131 do you find more?

A Yes, on Page 131 we have two items: The Aussie hat marked Safari, and short culotte marked Safari.

Q This is in the women's department, isn't it?

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A That's right.

Q And the other Aussie hat was in the men's maybe, is that right? Didn't we have another page with the Aussie hat on it?

A The one on 12[illegible] has a picture here depicting a woman's hat.

MR. HOPGOOD: Next I would like to mark as Exhibit 34 a catalog called Play Hours, 1964.

xxx (Plaintiff's Exhibit 34 was received in evidence.)

Q Mr. Geis, I ask you if you can recognize this Exhibit 34, which is an Abercrombie & Fitch catalog of 1964.

A That's right, the Play Hours Catalog.

Q Now, let's direct your attention to Page 11. Do you find on Page 11 an advertising of goods such as you have been testifying about?

A Yes, there are several items on Page 11.

Q What are the articles?

A The Safari articles listed on here is a Bermuda jacket, a shirt, a cap, Safari trousers, Bermuda shorts, a round hat, a bush jacket, and another pair of trousers not shown.

Q You mean there are --

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A Not illustrated.

Q There are illustrations for some of those but not for others?

A That's right.

Q Now let's go to Page 13. Do you find any more?

A Yes, Page 13 has a collection of shoes including an item identified as 81-10A, men's in Safari cotton shoes.

MR. HOPGOOD: Next I would like to mark as an exhibit the Abercrombie & Fitch Play Hours Catalog 1963.

MR. WELS: No objection.

(Plaintiff's Exhibit 35 was received in evidence.)

Q Mr. Geis, I show you the Play Hours 1963 catalog, which has been marked Exhibit 35, and direct your attention to certain pages in that catalog.

Now, Page 15, do you find any of the articles within the line that you have been testifying about?

A Yes, we have theBermuda shorts, the cloth trouser skirt. That is two items on the page and they are identified as Safari items.

Q They are all ladies' things on that page, aren't they?

A That's right.

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Q Now on Page 17, we have men's wear, do you find any articles within the line?

A Yes, we have a men's swordfish cap identified as a Safari cap, which is one of the caps that we talked about this morning.

Q The one with the big black shiny visor?

A That is right.

Q Next, I will direct your attention to the double-page spread appearing at Pages 22-23. Do you find more items within the line there, and if so what items?

A Yes, on Page 22 we have some men's clothing items, a bush jacket, a shirt, and Bermuda shorts all for men, all identified as Safari.

Q It is all under a page heading, isn't it?

A The heading says, "Famous A & F Safari cloth sportswear."

Then on the opposite page, Page 23, we have some caps listed, an item of a golfing cap and a yachting cap, the short-bill yachting cap.

Q Is that like one we marked this morning?

A It is similar to the one that we talked about this morning. They are also identified as Safari merchandise.

MR. HOPGOOD: Now I have one of your catalogs

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which has no title printed on the outside. The best I can find is on Page 3 inside where it says "Camping 1960." And it bears a 1960 copyright notice. I would like to have this marked as the next exhibit number.

MR. WELS: No objection.

(Plaintiff's Exhibit 36 was received in evidence.)

Q Mr. Geis, I will show you Plaintiff's Exhibit 36, the 1960 camping catalog, and direct attention to the double-page spread at Pages 38-39. Do you find articles within the line that you have been testifying about shown on these pages?

A Yes, on Page 38 we have a few items with the trademark Safari identifying them. One is the -- well, one is for general Safari cloth. Then there is also one for a bush jacket and there is a Safari cap and a Safari sun visor cap and a Safari jacket, and also Safari walking shorts.

This merchandise on 38 is all for men, and on the opposite page, 39, we have a collection of articles for women, which is a Safari cloth culotte and also a shirt marked Safari, and then there is Safari shorts and slacks and slag pants, all identified as being Safari merchandise, and a Safari jacket.

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A Safari cloth shirt, long sleeve. Yes, I may have missed that item.

Q Next I would like to mark as an exhibit another catalog which bears the title "Camping and Fishing 1959."

(Plaintiff's Exhibit 37 was received in evidence.)

Q Mr. Geis, I show you t[illegible]crombie & Fitch Camping and Fishing 1959 catalog which has been marked Exhibit 37, and direct your attention to the double-page spread at Pages 32 and 33.

Do you find on these pages articles within the description of those we marked and discussed this morning?

A Yes, on Page 32 we have a detachable creel wading vest, Safari, for men. Also the bush jacket for men and the swordfish cap, all identified as being Safari.

On Page 33, we have featherweight sports shirt and Safari walking shorts and also a Safari wading jacket and another item identified as nylon lined Safari jacket, one also identified as a Safari sport jacket and also Safari trousers and a Safari belt.

Then there is a collection of merchandise over here, camping outfits, Safari shirt, Safari fishing trousers, and boot britches, and a Safari cap, and a Safari round fishing hat.

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Also at the bottom of the page is a fishing coat identified as Safari merchandise, and there is a Safari belt.

Q At the top of Page 33, how about the caption?

A The caption at the top of the page reads as follows: "Our Famous Safari Cloth Can Take It," and there is an asterisk with a cross reference at the bottom of the page "Safari is the trademark of A & F. Co."

Q Now directing your attention to Pages 34 and 35 of this catalog, Exhibit 37, do you find more examples?

A Yes,on Page 34 there is some more examples. At the top of the page there is a heading "Our Famous Safari Cloth." Underneath it is listed the following items: Safari cloth culotte, knockabout Safari jacket, Safari slacks, Safari Bermuda jacket, Safari bush jacket, Safari fishing vest, Safari slacks, and Safari Bermuda shorts.

This is all clothing for women on Page 34.

On 35 we likewise have some more Safari identified merchandise, one item to be exact, a Safari shirt.

On Page 34 we have an identification with the heading at the top of the page which includes "Safari" and it is preceded by an asterisk and it is cross-referenced at the bottom of the page again "Safari is a trademark of A & F Co."

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MR. HOPGOOD: Next, your Honor, I don't know the date of this one, so I am going to have to ask the witness. I am anxious to abide by your request regarding dates of these things.

Q Mr. Geis, do you have some way of telling us the year of this catalog called "40,000 miles of Christmas"?

A There is no date on this catalog.

Q Do you recognize it as a regular Christmas catalog of the company?

A Yes. Oh, yes, I remember when it was issued. I can't tell you the year. It was at least three or four years ago. As a matter of fact, I can recall the time because Mr.Angstadt, president, signed this catalog, and he has been -- he has not been with Abercrombie since 19 -- some time in 1969.

Q Thenthis is before the litigation commenced?

A That's correct. Mr. Humphrey was president when the litigation commenced.

MR. HOPGOOD: I would like to have this catalog "40,000 Miles of Christmas" marked as the next exhibit.

MR. WELS: No objection.

THE COURT: Christmas what year was that?

MR. HOPGOOD: The best I can tell you, your Honor, is that it was before the litigation and the witness

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just placed it as best he could.

THE WITNESS: '68 or '69.

MR. HOPGOOD: We might be able to find out through the company.

THE WITNESS: They would have a record in the office.

MR. HOPGOOD: The reason that Mr.Angstadt's name is mentioned, your Honor, he has a letter on about Page 3 just inside. If you open the cover you will see Mr. Angstadt wrote a letter to his customers.

THE COURT: What significance do you attach to the letter?

MR. HOPGOOD: It helps to date the catalog as being before the litigation commenced.

Q Do you know the term of Mr.Angstadt's office as president? How long was he in that position, do you happen to know?

A About six years.

Q So we have it down to within a six-year spread, your Honor.

A And Mr. Humphrey came with the company some time in 1970.

Q When does the Christmas catalog go to press, as a rule?

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A Usually, it is in the mail in October, so it probably goes to press some time in late September or early October, so that it is mailed out and gets in the customers' hands during the month of October.

THE COURT: I was looking at this, and one of the reasons why I asked you to get the minutes, I don't see a date in here.

MR. HOPGOOD: We were trying to pin it down by reason of the fact that --

THE COURT: I went through it and I don't see any date in here.

MR. HOPGOOD: The witness said he couldn't find one.

THE COURT: It is of recent origin because I recall getting it in my home.

MR. HOPGOOD: Your Honor, if I may, we had the witness bracket the time by reason of the fact that --

THE COURT: I see the letter.

MR. HOPGOOD: Yes, the letter from Mr. Angstadt.

THE WITNESS: That precedes the litigation.

THE COURT: Yes, all right. Received in evidence.

(Plaintiff's Exhibit 38 was received in evidence.)

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Q Mr. Geis, I show you this Christmas catalog marked Exhibit 38, and direct your attention to Page 36. Do you find on that page any items within the description of those which you marked as representative this morning in the Safari line?

A Yes, there is an Upland shooting vest identified as Safari, and an unlined hunting coat in Safari, two items on that page.

Q Then on Page 69 of the same catalog, do you find any more?

A Yes, on Page 69, there is a shower-proof knock-about coat of suede finish, 100 per cent cotton Safari cloth.

Q Mr. Geis, have you had any occasion to inquire or try to develop the magnitude, in dollars, that is, of Plaintiff's business in its clothing articles such as we have marked as illustrative here, over the years?

THE COURT: If you want to give me the years by year, --

MR. HOPGOOD: '38 is the registration.

THE COURT: Give it to me for 1969. Would it run over $100,000, $200,000, a million dollars?

THE WITNESS: Yes, I think we made a calculation of how much Safari clothing business at Abercrombie has

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done in the interval between 1936 and 1970, and that totaled or aggregated something approximating $19 million over that period of time.

Q At least that is the order of magnitude?

A That's right. It is a significant classification of men's and women's clothing and shoes sold in our store. There is no question about that.

Q Can you give us some rough approximation of the proportionthat business bears to, shall we say, the rest of your clothing business?

A Well, a rough approximation would be that it is somewhere in the area approaching 10 per cent of the total business of clothing would be Safari-type clothing.

THE COURT: You also make suits, such as you are wearing now, in your merchandise?

THE WITNESS: That is right.

THE COURT: The price today is about 225 or 250 today, is it, for a three-piece suit?

THE WITNESS: Well, the higher price is 350, that is an Oxxford line, but for you typically would be about $175 would be an average suit today.

THE COURT: You have Morton Good there too, do you?

THE WITNESS: No.

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THE COURT: Oxxford.

THE WITNESS: Oxxford is our top quality line. This is not an Oxxford, your Honor.

Q I would like, if you can, to give us some figure by which we can judge your investment in advertising and promotion of the kind that you have been testifying about.

THE COURT: You mean of Safari clothing alone.

Q All right, if you can as to Safari alone.

A I wouldn't be able to do that. I just know what we spend overall for all advertising.

Q All right.

THE COURT: Safari merchandise is only 10 per cent of your total clothing items, right?

THE WITNESS: That's right.

THE COURT: In addition you sell sport items, fishing rods and rifles?

THE WITNESS: Fishing equipment, Rifles, Marine equipment. Gifts.

THE COURT: Shotguns.

THE WITNESS: Right.

MR. HOPGOOD: I would like the record to show the order of magritude of expense incurred by the company for its advertising and promotion.

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THE WITNESS: Well, our advertising budget for any given year will run anywhere from four to five per cent of sales. In the last few years our sales have been around $25 million, total sales of the corporation, so we have been spending approximately a million dollars a year on all advertising.

When I say all advertising, that encompasses catalogs, newspapers, magazines, and a small amount for other types of public relations items.

THE COURT: These Safari catalogs that you get out four times a year, are they gotten out for you by some advertising expert?

THE WITNESS: We have our own advertising department, but we do engage outsiders to take the photographs and present it and so forth.

THE COURT: All of those cuts that are in there, photographic cuts, they cost money?

THE WITNESS: That's right. Those photographs are taken by outside people, not our own.

THE COURT: And they run quite expensive, you have to pay for models?

THE WITNESS: Oh, yes.

THE COURT: All right.

Q You mentioned several mediums like the catalog

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and newspaper ads and the magazine ads. What porportion of the total do you attribute to the catalog?

A I am guessing. It would be at least 50 per cent, of our total advertising expense would be in the catalog.

MR. WELS: Your Honor, I object to the witness guessing. If he can't say --

THE COURT: I think the objection is well-taken. They apparently do spend considerable money advertising Safari products, as evidenced by the exhibits that you have introduced, and also it is a fact of common knowledge.

MR. HOPGOOD: I just thought from his position having to do with --

THE COURT: If he wants to bring in -- he is an accountant, he knows what he can do -- he can bring in tomorrow a little one sheet of paper, his advertising disbursements as reflected from his books for years prior to 1970.

MR. HOPGOOD: Fine, we will do that, sir.

THE COURT: Give the sum total if he wants to. How much, for instance, these Safari magazines, if he has that broken down into one account item, he can put that in.

MR. HOPGOOD: Your Honor, I did not want to

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represent to the Court, nor do I think the witness wished to represent, that these items we have been presenting, a whole catalog is not directed to just Safari items. Safari items are part of it. That is the reason why they are put in.

THE COURT: Some of those items are primarily Safari catalogs, fishing and camping, for instance.

Q Mention was made earlier, Mr. Geis, of policing efforts in regard to the mark Safari. Have you had a hand in that?

A Yes, since I have been responsible for trademark policies at Abercrombie since 1967 or 1968, I have had called to my attention by store managers or merchandise managers or buyers, instances where other companies have used any of our trademarks.

For instance, Safari was one that has been used in some instances.

Q What has your part been in the handling of the matter when occasions like that develop?

A Well, in such situation, I write a letter to our attorney, pointing out to him that an advertisement appeared in a newspaper which appears to me to be an infringement of our trademark, Safari, and ask him to follow up the matter for Abercrombie.

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Q You also mentioned that when you came into your present position, you inherited, so to speak, certain files of your predecessor. Did you find in those files records of similar policing activities?

A That's right, in the files that I acquired from my predecessor, Mr. Speh, I have had correspondence similar to what we are talking about here, complaints to stores and copies of their replies on situations where we claim there was some --

THE COURT: He can testify to this from 1965 on.

A I have handled that and before that I had the files --

MR. HOPGOOD: I am talking about his contact with the regular files of the company.

A They were turned over to me.

THE COURT: I know, but he said that up to 1965, his efforts were primarily accounting. Giving the time this man Speh left, he then took over the alleged infringements and the files, and then conducted and supervised the so-called legal matters concerning infringements.

THE WITNESS: That is correct.

THE COURT: We had that all this morning.

Q Have you had occasion in the preparation of materials for this case to look over these records and to

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classify them according to Safari and clothing?

A Yes, I made an extensive search of our files in that effect.

Q I would like to show you a summary sheet. Is this the summary sheet that summarizes the work you have done with counsel in putting together a classification of such complaining correspondence or contacts?

A Yes, it is, I can identify it.

MR. HOPGOOD: I would like to have this tabulation, which is headed "Plaintiff's Policing of Safari Clothing resulting in abatement of infringement short of litigation," --

MR. WELS: Your Honor, I must object to receipt of this because of its caption "Resulting in abatement of infringement short of litigation" because there is no testimony as to that, and I think we will establish to the contrary.

THE COURT: I am going to receive it. You may cross-examine him on it. I am going to receive on two theories, for two reasons: One, it shows that they were conscious of what they claimed to be a property right in this word Safari, and that they didn't sleep on their rights, and knowingly lost those rights by not enforcing them.

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While it is true that on an infringement of a mark, it is an innocent infringement, you can't recover damages until you call it to his attention. He doesn't seek to recover damages here. Is that correct?

MR. HOPGOOD: In this action?

THE COURT: Yes. Do you now seek to recover damages?

MR. HOPGOOD: I did say, your Honor, in my opening remark.

THE COURT: Do you now seek to recover damages among your forms of relief here now on this trial?

MR. HOPGOOD: As at present advised, yes, sir.

THE COURT: Do you seek to also recover for counsel fees?

MR. HOPGOOD: I doubt if I could.

THE COURT: If you can.

MR. HOPGOOD: If I can, subject to your Honor's views of it.

THE COURT: All right. I am going to receive it. You have an exception to my ruling.

x (Plaintiff's Exhibit 39 was received in evidence.)

Q Mr. Geis, this caption indicates that these matters with the various events tabulated here in Exhibit

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39 resulted in abatement of infringement short of litigation.

Do you know of any litigations involving the mark Safari on behalf of Abercrombie & Fitch, and involving anybody other than Hunting World, the defendant in this action?

A No, there have been none.

Q And Hunting World is not part of this tabulation?

A That's correct.

MR. HOPGOOD: Your Honor, I am trying to simplify things, and of course, with the shortness of time getting ready for this, I have had to do a streamlining operation. One element of that is that I have taken for purposes of coordination with what we have just marked Exhibit 39, the items which were attached to Mr. Geis' affidavit and which appear in this list, and these items have been done as one collection which I will now show to the other side. They have been these anyway.

I would like to have this collection of papers marked with the next exhibit numbers.

THE COURT: What are you going to have marked now? Mark it for identification first.

MR. HOPGOOD: Yes, sir. I would like to explain more fully about this.

(Plaintiff's Exhibit 40 was marked for

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identification.)

MR. HOPGOOD: May I explain what these are, sir?

THE COURT: You may ask him whether these are from the files of the company kept in the regular course of its business concerning the alleged complaints or complaints of alleged infringements of Safari.

MR. HOPGOOD: Surely.

Q Did you hear the Judge's question, Mr. Geis?

A Yes.

THE COURT: It wasn't a question. You do it.

MR. HOPGOOD: I shall ask the Judge's question.

Q Do you recognize these items which have been marked Exhibit 40 for identification as coming from the regular records of the company and having to do with complaints against others for alleged infringement of the mark Safari?

A Yes, this collection is copies of correspondence we have in the company files, trademark files.

THE COURT: You just identify that as Plaintiff's Exhibit 40 for identification.

THE WITNESS: Yes.

THE COURT: You testified before that when your predecessor as copyright counsel --

MR. HOPGOOD: Trademark, sir.

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THE COURT: Trademark coun sl, left the employ of your com pany, you took over his files.

THE WITNESS: That is correct.

THE COURT: When you said his files, you meant the files of the company?

THE WITNESS: That's right.

THE COURT: Were those files kept by him as part of the company records and in the regular course of its business?

THE WITNESS: That is correct.

THE COURT: These are part of those files?

THE WITNESS: And they are part of my files today.

THE COURT: Part of the company's files?

THE WITNESS: That I am responsible for.

THE COURT: In your office?

THE WITNESS: That's right.

THE COURT: You offer them in evidence?

MR. HOPGOOD: Yes, sir.

MR. WELS: I have no objection, your Honor.

THE COURT: Received in evidence.

(Plaintiff's Exhibit 40 was received in evidence.)

MR. HOPGOOD: I would like to explain, your

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Honor, the correlation between Exhibit 40 and Exhibit 39.

THE COURT: I think it is quite apparent, but if you want to put it on the record, you can.

MR. HOPGOOD: It has been an attempt made to make it simple. In the tabulation of --

THE COURT: You don't have to make it so simple, please. I have been on the bench here for 27 years. I have been a member of the bar for almost 60 years, so -- not that long, but 50-odd years anyway, 52 years, so you don't have to make it too simple, please.

I used to try cases perhaps before you were born.

Next question.

MR. HOPGOOD: I applied a letter, in a circle, at the bottom right corner of every one of the items of Exhibit 40. These letters correspond to parenthetical references in the tabulation of Exhibit 39.

THE COURT: Very careful trial preparation for which I commend you.

Q Those letters in Exhibit 40, Mr. Geis, are merely the final wind-up letters, so to speak, where the partyto whom the complaint was directed, is writing back to counsel. I would like, just to have the record show something typical, to take just one of these to show your

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pattern of connection with the handling of the matter; and when you were with us yesterday afternoon you said take Neiman-Marcus, so you took Neiman-Marcus, and I have the full collection of correspondence on that, have just given a copy to the other side, and would like to mark it with the next exhibit number.

(Plaintiff's Exhibit 41 was marked for identification.)

MR. WELS: No objection.

(Plaintiff's Exhibit 41 was received in evidence.)

Q Perhaps, Mr. Geis, you can briefly use this collection, which is Exhibit 41, and explain the course of a typical handling of a complaining round of correspondence. It starts with the top and works down.

A Yes, I just wanted to familiarize myself with it.

The first letter in this group is a letter dated March 13, 1969, addressed to John M. Calimafde of the law firm of Sandoe, Hopgood & Calimafde. Did you want me to read the letter, counsel?

Q I would just like you to account for it. That is a letter that you wrote, isn't it?

A I sent this letter to Mr.Calimafde reporting

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an incident that was called to my attention at the Bal Harbor Store where our store manager noticed Nieman-Marcus selling merchandise Safari, or marked Safari, and thought there was some conflict with our trademark, called it to my attention, and I in turn wrote to Mr. Calimafde.

The merchandise involved is a straw hat.

Q Show on the next page after your letter?

A That's right.

Q Was that an attachment to your letter to Mr. Calimafde?

A Yes, I believe it was. Usually I send to them a copy of the newspaper ad or any other material that might be sent to me, so this looks like a reproduction of a newspaper ad.

Q Then we have --

A Then we have a letter written by Mr. Calimafde to the president of Nieman-Marcus, pointing out that Safari has been used by that company and that Abercrombie has the trademark Safari, etc.

The letter is sent to them by registered mail. There is a copy of the receipt for such postal receipt attached.

Then we have next a letter from Nieman-Marcus stating -- to Mr. Calimafde, "Your letter of March 17th

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directed to the president of Nieman-Marcus is received, has been received during Mr.Samuel Marcus' absence from the country. Mr.Marcus is now on an extended trip to the Far East and in his absence I have turned the letter over to Mr. Norman W. Bramley, our senior vice-president, and treasurer."

Then we have a letter from Nieman-Marcus under the signature of Norman W. Bramley, addressed to Mr. Calimafde, stating, "In response to your letter of March 17, I have asked our advertising department and our direct mail department to refrain from using your client's trademark Safari in the future."

Then the last letter in this file is a letter from Mr. Calimafde to Abercrombie & Fitch addressed to Henry C. Geis. "Dear Mr. Geis: I am pleased to inform you that Nieman-Marcus has replied to our letter of March 17 indicating that it shall refrain from using the trademark Safari in the future."

That would be typical of a sequence of events that I have been involved in in policing this type of situation.

Q And short of litigation?

A That is correct.

Q And the letter which you told us about in Exhibit

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41, where they say they will no longer use the mark, which is the letter of March 24 from Mr. Bramley, is the kind of letter which is included at J in the collection of Exhibit 40?

A Correct.

Q Now, as typical of the situation conducted by your predecessor as you found it in the files of the company, I would like to put just one example of one that preceded your coming in, and I have handed a copy to counsel.

I would like to have this marked as the next exhibit number.

THE COURT: I think you have had enough of this aspect of the case. You have shown by this correspondence, Number 1, some evidence that the plaintiff has amply asserted its right to the exclusive use of the word Safari with relation to certain articles of furnishings.

You have shown too that that right has been recognized and has been accepted by others in the industry and has been accepted and when it is called to their attention they have acknowledged and have recognized the fact that Abercrombie & Fitch has an exclusive right to the use of that word Safari as a trade name in the industry.

What more do you want to show?

MR. HOPGOOD: I realize, your Honor, that it is

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somewhat cumulative. I didn't mean to be burdensome.

THE COURT: No, you can do what you want. The only trouble is, if there is an appeal here, the Court of Appeals may wonder why I took all these exhibits, and I don't see the need for it.

However, go ahead and make your record.

MR. HOPGOOD: I have only this one.

MR. WELS: No objection.

(Plaintiff's Exhibit 42 was marked for identification.)

THE COURT: Particularly since Mr. Wels has not made an objection to this.

MR. HOPGOOD: We will just let the exhib it go in and it will explain itself, your Honor.

THE COURT: I think it would, if that is what you want. What is this exhibit, Number 42?

It is received in evidence by consent, Mr. Wels?

MR. WELS: Yes.

THE COURT: What is this one now? The other, Nieman-Marcus was '69, as I remember.

MR. HOPGOOD: This one happens to be '64, your Honor. It involved Eddie Bauer.

Q Can you explain Eddie Bauer to the Court, please, Mr. Geis?

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A Well, Eddie Bauer is primarily a mail order house. They do have a few small retain stores but they are in the outdoor and hunting and fishing area of business quite similar to Abercrombie.

MR. HOPGOOD: As I said, your Honor, the thing is self-explanatory.

Now I would like the record to show the correspondence which led to the present litigation.

Q Did you have a part in the generation of that correspondence?

A Yes, I did.

Q And again, did it follow this pattern of bringing it to the attention of counsel?

A The Hunting World situation?

Q That's right.

A Yes, that is right.

MR. HOPGOOD: Your Honor, I just don't have three copies of this right at the moment, but I have it in proper order. I would be glad to call it all one exhibit. It is a succession of letters and attachmen ts.

THE COURT: All right.

MR. HOPGOOD: Let's at least mark it.

THE COURT: Exhbit No. 43.

(Plaintiff's Exhibit 43 was marked for

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identification.

THE COURT: Any objection to this?

MR. WELS: I have to see it.

MR. HOPGOOD: I will show it to him.

THE COURT: Show it to him. Maybe he will consent to it.

xxx (Plaintiff's Exhibit 43 was received in evidence.)

Q Mr. Geis, I will show you a collection of correspondence which begins with Mr. Calimafde's letter of February 18, 1969, to the president of Hunting World, and which runs up to a letter from our office, which I will state I signed -- it just happened to be I guess our copy -- to Mr. Wels, December 10, 1969.

Do you recognize that as the complaining correspondence leading to the litigation?

A Yes, I am familiar with this file.

Q In this collection, Mr. Geis, of Exhibit 43, you will find, I believe, three attachments to letters, such attachments being copies of advertisements of Hunting World.

Do you recognize those as items which you sent to our firm in order to progress the correspondence or copies of them, shall I say?

A Yes, I recognize these copies as copies of

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materials that I sent to your firm.

MR. HOPGOOD: Again, your Honor, I think the correspondence is self-explanatory and I won't burden the record with more on that.

I think in view of my opening remarks, your Honor, I should make a little statement about these things that were complained of, these attachments that Mr. Geis just said he recognized as having sent to -- in connection with this correspondence.

THE COURT: Counsel, it would be better if you saved your observations until later. It is my intention, and it is always my practice in a non-jury case, after both sides have rested and before I give my decision, I set aside a time when you can come in and make a sort of summation or argument.

MR. HOPGOOD: Very good.

THE COURT: All right.

MR. HOPGOOD: All right, sir.

THE COURT: That is my practice.

MR. HOPGOOD: I thought it might be illuminating to say what is objectionab le in the ads, but that is all right. We will do it at the end.

THE COURT: I will give you full opportunity to do it.

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MR. HOPGOOD: Surely.

THE COURT: If you think I have missed it, all right, but when we are through, I will hear you both in summation. I think that is only fair and that is my practice.

Then I will give you my decision. If I can I will decide it immediately from the bench. If I can't, then I will reserve decision, but if I can, I will. I may decide in your favor and leave the specific findings to be settled later, whichever way I decide.

MR. HOPGOOD: I think, your Honor, we shall have to proceed next by introducing specimens of a number of the ads of the other side representing what we complain about in the action, and I would like, of course, to abide by your Honor's wish on this.

THE COURT: On this, now, you better be full and be complete, because this is the basis of your complaint now.

MR. HOPGOOD: Right. This is why, of course, I was going to --

THE COURT: You dont have to make any explanation about this. You just take your time on this. This is very important to your case.

MR. HOPGOOD: Yes, that is why I wanted to make

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observations on those attachments in the previous exhibit because they are definitely part of this extremely important phase of the case.

I would first like to have your Honor's wish on this, however. Should I be confining myself to matters before the litigation?

THE COURT: I think that in this matter, to show a knowing and deliberate violation, you can also show matters after the filing of the complaint.

MR. HOPGOOD: At least the ones that are included in this?

THE COURT: You can show after.

MR. HOPGOOD: Thank you.

THE COURT: These advertisements you may show after.

MR. HOPGOOD: Thank you. Now my point is that with regard to the Exhibit 43 --

THE COURT: As far as he is concerned, the defendant, my objection to the incidents after the filing of the complaint were directed to your complaints topeople other than the defendant.

MR. HOPGOOD: All right, very good.

Now I just thought I should observe that in the previous exhibit, which is No. 43, namely the

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complaining correspondence with Hunting World, that all had to be necessarily before the litigation commenced. It covered a span of ten months.

THE COURT: You can introduce any advertisement that you claim was published by this defendant at any time after the time that the mark was registered.

MR. HOPGOOD: Yes. Well, the marks were registered long before they came in business.

All right, then subject to that, I shall just take them as they come up. We have first, an ad at Page 7 in the Wall Street Journal, Monday, June 8, 1970. It is captioned "The Safari Hat for town and country is here, our Minisafari" --

THE COURT: You offer this as an advertisement of the defendant?

MR. HOPGOOD: Oh, yes, it is.

MR. WELS: No objection.

THE COURT: Received in evidence.

(Plaintiff's Exhibit 44 was received in evidence.)

THE COURT: Go ahead now, next one.

You are showing counsel the next one, which is 45 for identification. You haven't described what it is, counsel.

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MR. HOPGOOD: Not yet, sir.

THE COURT: All right.

MR. WELS: No objection.

THE COURT: Received in evidence, Exhibit No. 45.

MR. HOPGOOD: As to 45, I will explain, your Honor, this is an ad in the New York Times, Saturday, March 6, 1971, another ad on the Minisafari T.M.

THE COURT: Received in evidence by consent.

(Plaintiff's Exhibit 45 was received in evidence.)

MR. HOPGOOD: This is the 1969 catalog of Hunting World and we are going to mark the whole thing.

MR. WELS: No objection.

THE COURT: Received in evidence.

(Plaintiff's Exhibit 46 was received in evidence.)

MR. HOPGOOD: At this juncture, your Honor, we would like to direct attention to the double-page spread at Pages 66 and 67 in this catalog which is Exhibit 46.

THE COURT: I think we will take our recess now until tomorrow morning at 11:00 o'clock.

(Adjourned to Friday, November 30, 1973, at 11:00 A.M.)

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Abercrombie & Fitch

v. 70 Civ. 377

Hunting World

New York, November 30, 1973
11:10 a.m.

- - -

(Trial resumed.)

- - -

THE COURT: All right, gentlemen, the trial is continued now.

MR. HOPGOOD: Your Honor, as we closed yesterday afternoon we were in the process of marking various samplings of what we are complaining about in this action. I wish to continue with that at this point.

THE COURT: When we adjourned last night it was agreed that this morning the witness would come in today with an analysis.

MR. HOPGOOD: Oh, very good.

THE COURT: An analysis of moneys spent advertising, own advertising. First to show generally what the purpose of it was, and I was accepting it for this purpose, first to show the general reputation of Abercrombie & Fitch to show that they had built up a trade name not only by their

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business, the way they conduct their business, but by advertising.

MR. HOPGOOD: That is right.

THE COURT: Then secondly with reference to a Safari, he was going to give to us a breakdown of the moneys spent advertising Safaris.

MR. HOPGOOD: Well, I did not wish to --

THE COURT: As best he could.

MR. HOPGOOD: Your Honor, I wish to clear that one because I think it is impossible to fragment it according to Safari.

THE COURT: Please, counsel, if it is impossible, let the witness say so. Don't you testify. That is where we left off.

Now then, after that we were then going to go and you wanted to continue and give me some more of the advertising and of the cataloguing of the defendant.

MR. HOPGOOD: Yes, sir.

THE COURT: All right. Now, that is my recollection.

MR. HOPGOOD: Yes, sir.

THE COURT: Is your recollection refreshed by my recollection?

MR. HOPGOOD: It is refreshed with some

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qualifications, but, let that be developed, your Honor.

THE COURT: All right.

H E N R Y C. G E I S, called as a witness on behalf of the plaintiff, having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. HOPGOOD:

Q Mr. Geis, overnight did you have occasion to refer to records in your possession at the company having to do with advertising and promotional expense?

A Yes, I did.

Q Now, I show you this handwritten summary. Is this what you prepared (handing)?

A Yes, counselor, this is what I prepared last evening.

MR. HOPGOOD: I would ask that it be marked for identification, your Honor. I will give a Xerox copy to the other side.

(Plaintiff's Exhibit 47 was marked for identification.)

Q Mr. Geis, will you please state what you have attempted to do with this presentation in Exhibit No. 47 (handing)?

A I have prepared in summary form a breakdown of

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our advertising expense for the years ended January 1970, 1971, 1972 and 1973.

The breakdown is by classification of advertising expense, and includes newspaper space, catalog costs, magazine space, enclosures in special notices, radio and T.V., production costs, publicity expense and other expenses which include salaries, travel, supplies, dues and entertainment of the advertising department, showing a total advertising expense for the year, deducting therefrom, vendor participation, which is contributions that vendors have made towards newspaper, catalog and magazine space, resulting in a net expense for each of the four fiscal years in question.

THE COURT: Vendor participation means that your suppliers have given you a discount on your bills?

THE WITNESS: Our discount of the bill or they give us a check if we have proof of advertising. You have to show them the copy of media so that they are in fact sure that you have run the ad.

This would apply also to catalog. You give them a page of the catalog, or a cagalog showing their item as advertised in your catalog, and they have a program.

THE C OURT: Do you give them a check or advertising script of their participation?

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THE WITNESS: We only give them a sample of the catalog, and they give us a check, usually a check for the amount of their allowance.

THE COURT: They don't buy any advertising script from you?

THE WITNESS: No.

THE COURT: All right, go ahead.

BY MR. HOPGOOD:

Q Mr. Geis, I notice that these tablulations presented in Exhibit No. 47 are for four years beginning with the year 1970.

Is there a reason why you stopped at that point?

A Yes, there is a good reason. Considering the fact that I left here late yesterday afternoon and arrived in the office uptown close to 4:30, I was unable to get records, subsidiary records prior to 1970 because they happened to be stored in our warehouse over in New Jersey.

So time itself precluded me from going back any further than 1970.

Q Have you taken any steps to acquire those records from the warehouse?

A Yes, I have ordered my assistant to get subsidiary records for years prior to 1970 so a similar tabulation can be produced.

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MR. HOPGOOD: Your Honor, I shall ask the witness at his earliest convenience to make use of those records from the warehouse, but they are on the way and can be presented after the weekend.

THE COURT: What exhibit is this now?

MR. HOPGOOD: Exhibit 47.

THE CLERK: Exhibit 47 for identification.

THE COURT: You offer it in evidence, do you?

MR. HOPGOOD: Your Honor, I would like to draw attention to one thing. I think we must ask another question. I would like to offer it, of course.

Q Mr. Geis, you make reference to fiscal year ending January. Can you tell us what the company's fiscal year is?

A Yes. We have a fiscal year that ends on the last Saturday of January. It's a 52-53 week year.

THE COURT: He has got that noted at the top, year ended January.

THE WITNESS: It's not in every case January 31st. It could be the 30th, the 29th, the 28th.

Q All right.

Now, just to make it clear, the first column which you have labelled 1970 then is really a picture for the year 1969 primarily, isn't it?

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A In essence, 11 months of 1969 and one month of 1970.

MR. HOPGOOD: Thank you. I would like to offer the exhibit in evidence.

MR. WELS: May I ask a few questions on the voir dire, your Honor?

THE COURT: Do you object?

MR. WELS: Well, I could do it on cross examination.

THE COURT: If you object I will overrule your objection. Do you enter an objection or do you consent that it be received?

MR. WELS: I have no objection, your Honor.

THE COURT: What?

MR. WELS: I have no objection, your Honor.

THE COURT: All right. It will be received in evidence.

(Plaintiff's Exhibit 47 was received in evidence.)

MR. HOPGOOD: I would like the opportunity, your Honor, to have the witness supply us with such figures as he can from the warehouse.

THE COURT: You may.

MR. HOPGOOD: At a later time.

THE COURT: Are you through with this witness now?

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MR. HOPGOOD: Not quite.

THE COURT: All right.

MR. HOPGOOD: I was in the process, as I say, of submitting some samples of the kinds of things that we are complaining of in this action, and I have a photograph taken of a hatband in which the word, or mark, "Minisafari" appears.

This is one of the items as to which we are complaining in this action.

THE COURT: The inside hatband?

MR. HOPGOOD: Yes, sir. It has been marked Exhibit 5 on the Lee deposition.

THE COURT: You offer this in evidence now?

MR. HOPGOOD: I do, sir. They don't object, your Honor.

THE COURT: Do you consent?

MR. WELS: Yes, sir.

THE COURT: Do you consent also, or concede that this is a photograph --

MR. WELS: May I look at it, your Honor?

THE COURT: Yes. The photograph of the hatband which you -- a hat which you marketed.

MR. WELS: Yes, your Honor. For the record, your Honor, it says "Dorian, Minisafari".

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THE COURT: All right, Plaintiff's Exhibit No. 48 will be received in evidence.

(Plaintiff's Exhibit 48 was received in evidence.)

THE COURT: Is it conceded this is a hatband from one of the defendants products which it sells?

MR.WELS: Yes, your Honor.

THE COURT: Who is Dorian, do you know?

MR. WELS: Yes, sir. Dorian is the manufacturer of the hatband in South Africa, your Honor, from whom we bought it.

Of the hat. Of the hat. And the hatband is placed in there in South Africa.

MR. HOPGOOD: I might also say, your Honor, that these are the hats which are sold pursuant to the advertisements which we have already had some testimony about.

MR. WELS: Your Honor, we have the hats themselves here and we will be placing them in evidence.

THE COURT: You are going to put them in evidence. All right, it is received in evidence by consent.

MR.WELS: This, your Honor, is the actual Minisafari hat with that same band.

THE COURT: Do you want to offer one of them in

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evidence?

MR. WELS: Yes, your Honor, I will be delighted to ofer the Minisafari as Exhibit A.

THE COURT: Suppose we mark it Defendant's Exhibit 47-A.

MR. HOPGOOD: Plaintiff's, or --

THE COURT: I mean Plaintiff's Exhibit 47-A, and it is conceded by the defendant that is one of the hats it produces and markets.

MR.WELS: It is not produced by it.

THE COURT: Well, it markets. It markets. It also has"Hunting World" in it.

Is that an elephant in there?

MR. WELS: Yes, sir.

THE COURT: "Hunting World" on the top.

MR. HOPGOOD: Your Honor, may I see that, please?

THE COURT: Yes (handing).

You see, that doesn't show on your --

MR. HOPGOOD: Your Honor, I had --

THE COURT: How much does that retail for?

MR. WELS: $30, your Honor.

THE COURT: Your photograph doesn't show that this was --

MR. HOPGOOD: I would like to show you the

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photograph again, sir.

THE COURT: Well, I remember the photograph.

MR. HOPGOOD: No, I really insist, if I may.

THE COURT: What do you want to show me?

MR. HOPGOOD: That the mark as shown in this photograph is different from the way it is shown on the article you are holding in your hand.

THE COURT: Oh, it says "Made in South Africa".

MR. HOPGOOD: No, it has "TM",doesn't it, written on the hatband?

THE COURT: There is a littlebit of a -- it looks like quotation marks, but appears to be a small "T" and small "M" after the letter "I" of Safari.

MR. HOPGOOD: "Minisafari." It's conceivable that the hat submitted to us is of Minisafari use in 1970 when the Lee examination was taken, is representative of the use of a different stamping die for the mark than was used in the specimen you are holding in your hand, Exhibit 48-A.

MR. WELS: Mr. Hopgppd, I think when Mr. Lee takes the stand you will be able to question as to that and he will be able to satisfy you with regard to that.

(Defendant's Exhibit 48-A was received in evidence.)

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MR. HOPGOOD: Next I have three specimens of advertisements, I can't tell the date, but I believe these are advertisements that were developed in the -- oh, we have the originals.

Would it be all right to take it apart for the purposes of marking it, your Honor?

In connection with the Lee deposition which is on file in the case --

THE COURT: As far as I am concerned there is no reason why you can't.

MR. HOPGOOD: This ad I would like to mark with the next number, it was marked PDX 3 on the Lee examination that I was talking about. It's in the New York Times of December 8th, 1969. It's for this Minisafari "TM" hat.

MR. WELS: No objection.

(Plaintiff's Exhibit 49 was received in evidence.)

MR. HOPGOOD: Next we have a cut and torn clipping of another ad which was marked PDX 7 on the Lee deposition, also for the Minisafari TM hat.

I would like to offer that.

MR. WELS: No objection.

(Plaintiff's Exhibit 50 was received in evidence.)

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MR. WELS: Do you have the date of that one, Mr. Hopgood?

MR. HOPGOOD: All I can do is rely upon the deposition. I don'thave it on the article itself.

Next I have another clipping for the Minisafari TM hat which was marked PDX 21 on the Lee deposition.

MR. WELS: No objection.

(Plaintiff's Exhibit 51 was received in evidence.)

MR. HOPGOOD: Now we are going to the subject of shoes. First I will offer a reprint of an ad that was marked on the Lee deposition as PDX No. 2.

MR.WELS: No objection.

(Plaintiff's Exhibit 52 was received in evidence.)

MR. HOPGOOD: Next I have page 64 of the July 19, 1969 issue of the New Yorker Magazine having a small insert ad of Hunting World. It was marked PDX Exhibit 6 on the Lee deposition.

MR. WELS: No objection.

(Plaintiff's Exhibit 53 was received in evidence.)

MR. HOPGOOD: Next I have a torn part of a page from a newspaper which looks like the New York Times, from

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the printing style. It has an advertisement of Hunting World Safari shoes from Safari Land. It was marked Exhibit PDX 8 on the Lee deposition. I understand there is no ojection to the exhibit.

(Plaintiff's Exhibit 54 was received in evidence.)

MR. HOPGOOD: The item which I am now offering as the next exhibit was from what looks like the New York Times -- yes, the Sunday Magazine of November 9, 1969, page 123. It was marked PDX 9 on the Lee deposition.

I understand there is no objection to it being received in evidence.

(Plaintiff's Exhibit 55 was received in evidence.)

MR. HOPGOOD: Next I have page 71 out of one of the catalogs of Hunting World. It was marked PDX 12 on the Lee deposition. It has to do with shoes. The top item being Camel Safari Chukkas.

I understand there is no objection to the item being received as an exhibit.

(Plaintiff's Exhibit 56 was received in evidence.)

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MR. HOPGOOD: Next I have another item from a catalog of Hunting World, page 62 of that catalog.

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That was marked PDX 16 on the Lee deposition.

It starts off "Safari shoes from Safariland."

I understand there is no objection to the item being received as an exhibit.

(Plaintiff's Exhibit 57 was received in evidence.)

MR. HOPGOOD: Next I have a string tag which was marked Exhibit PDX 17 on the Lee deposition and said to be used in connection with the actual shoes.

It has the part we object to, "Safari shoes from Safari country."

I understand there is no objection to the item being received as an exhibit.

(Plaintiff's Exhibit 58 was received in evidence.)

MR. HOPGOOD: Next I have a newspaper advertisement, clipping, which was marked PDX 18 on the Lee deposition. It is headed "The Safari Chukka."

I understand there is no objection. I would like to have it marked as the next exhibit.

(Plaintiff's Exhibit 59 was received in evidence.)

MR. HOPGOOD: We have another fragment of a New York Times Magazine ad. It happens to be page 144.

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I don't know the date, but it was marked on the Lee deposition as PDX 20. It is headed up, "Safari shoes from Safariland. The Safari Chukka."

MR. WELLS: No objection.

(Plaintiff's Exhibit 60 was received in evidence.)

MR. HOPGOOD: I have another newspaper clipping, advertising shoes, the Safari Chukka, under the headline "First Elephant Shoe Sale". It was marked PDX 19 on the Lee deposition. I understand there was no objection to it being received as an exhibit.

(Plaintiff's Exhibit 61 was received in evidence.)

MR. HOPGOOD: Next we have an ad reprint which was marked Exhibit PDX 13 on the Lee deposition. We are now going to clothing. It is headed "Safari Clothes from Safari Country."

I understand there was no objection to this being received as an exhibit.

(Plaintiff's Exhibit 62 was received in evidence.)

MR. HOPGOOD: Next I would like to use an advertisement which is part of the page from the New York Times issue of December 5, 1970, the portion being the

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Hunting World ad headed "Safari Clothes from Safari Country."

I understand there is no objection to this being received as an exhibit.

(Plaintiff's Exhibit 63 was received in evidence.)

MR. HOPGOOD: Next I have a page from one of the catalogs of the defendant, page 40, that was marked PDX 14 on the Lee deposition.

I understand there is no objection to its being received as an exhibit.

(Plaintiff's Exhibit 64 was received in evidence.)

MR. HOPGOOD: I would like to place in evidence, your Honor, another one of the defendant's catalogs, it is the one that has 1971 on the front. It has a copyright date of 1970. I think that for everybody's convenience we ought to note what seems to be a practice that the copyright date is the year preceding the catalog issue year captioned on front, and that it issues shortly before the year of coverage.

I would like to have the item received.

MR. WELS: No objection.

(Plaintiff's Exhibit 65 was received in

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evidence.)

MR. HOPGOOD: In this catalog, your Honor, I would like to call attention to items to which we object.

On page 9 in text, item H, "Our Minisafari hat."

I wish I could look at the item, your Honor. I was hoping I could look at another one to know that I was identifying things correctly, but it had some missing pages.

Page 26, the reference to Safari clothes from Safari country.

Page 33, the reference to Safariland.

THE COURT: What is objectionable about Safariland.

MR. HOPGOOD: It is part of their shop, your Honor. They call the shop Safariland.

THE COURT: What is wrong with that? It doesn't apply to the merchandise, does it?

MR. HOPGOOD: Well, it's in conjunction with the merchandise we are talking about being sold. It's part of the undue emphasis given to Safari, alone or combined with other words. They put "TM" on it.

THE COURT: Let me see that. Page 33? I think you have gone too far on that. You may have your right to have the injunctive relief on the use of Safari connected and associated directly in the name of

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any merchandise.

MR HOPGOOD: Well, I am only doing it for the sake of completeness, your Honor.

THE COURT: I know, but it is going beyond what you have a right to -- where is it? Page 33?

MR. HOPGOOD: Yes, your Honor.

MR. WELS: Right up on the top of the page, "You are cordially invited to visit our new Safariland when you are in New York."

Under the picture, your Honor.

THE COURT: All right. I will have to turn it over in my mind.

MR. HOPGOOD: I might note to your Honor that many of the advertisements --

THE COURT: All right, I see what your point is.

MR. HOPGOOD: All right.

Now page 61 --

THE COURT: It doesn't strike me right off the bat, but you may be entitled to it. I will have to look at it.

MR. HOPGOOD: Yes. Page 61 having to do with shoes.

THE COURT: Going back to that Safariland on page 33 of this exhibit, it's all put in one word.

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If it were put in the text as two separate words, from Safariland, I don't think there would be any doubt that you would not be entitled to any injunctive relief on that.

MR. HOPGOOD: That isn't the question we are presented with, your Honor. You are asking me something hypothetical.

THE COURT: I know, I am just pointing out what I have got to pass judgment on here.

MR. HOPGOOD: I would agree that these things that I am talking about do have a proper use, but we are complaining about the way in which they are used. That really is our position.

THE COURT: What you are complaining about is the composition of it.

MR. HOPGOOD: That's right. And the manner of use.

THE COURT: All right.

MR. HOPGOOD: Next there is a double page spread, pages 68 and 69, having to do with hats including the Minisafari, and shoes, including Camel Safari Chukkas, and that I just wanted to identify for the record, the pages of that Exhibit 65.

Your Honor, I have some items that were exhibits annexed to the Geis affidavit to which you have heard

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reference previously in this matter, and we would like to have these marked and received as exhibits in the trial.

Do we have permission to take the Court copy which is the best copy?

THE COURT: Yes.

MR. HOPGOOD: Thank you. This happens to be an Abercrombie & Fitch advertisement of a shoe, Safari Kahn Cxford. It's a reprint of the advertisement and shows a notation of the time, that is the date, 1959, of the appearance and the various newspapers in which it appeared.

It was marked on the Geis affidavit as Exhibit No. 36.

I would like to have it received as the next exhibit. I understand there is no objection.

(Plaintiff's Exhibit 66 was received in evidence.)

BY MR. HOPGOOD:

Q Mr. Geis, I know that the year 1959 is before yourtime, but I am asking you whether this type of ad or reprint conforms with your understanding of the practice of the company to issue a given advertisement in a number of different newspapers (handing).

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A Yes, it is.

Q And some of those newspapers indicated at the bottom are in accordance with your testimony of yesterday, aren't they?

A That's correct.

Q In case there is some difficulty with loss of identity would you please read the newspapers for this particular ad?

A The New York Times, the New York Herald Tribune, Chicago Tribune, San Francisco Chronicle, San Francisco Examiner.

MR. HOPGOOD: Merely for simplicity in handling the item illustrative of plaintiff's goods I think we should have marked as exhibits, and I understand there is no objection to having them marked as exhibits -- received, -- certain items which were exhibits on the Geis affidavit.

First, Geiss affidavit Exhibit No. 14 showing the plaintiff's Safari label in the waistband of an article of clothing.

THE COURT: Do you think that is necessary? We have got the label, we have got the garments in. The garments in evidence have the waistband.

MR. HOPGOOD: Why don't you put them in as one exhibit, your Honor?

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THE COURT: I don't want to preclude you from making any record that you feel is necessary. But we are running up a fabulous number of exhibits here already. The only point is after I go through all of this and after I give my decision on the extent of -- the extent of the injunctive relief that you are to get is a problem here. And if you don't agree with what I find, you have got those labels in evidence that are in the garments, they are in the shirts, they are in the blouses, they are in the coats.

MR. HOPGOOD: Very good, sir. Then I won't --

THE COURT: Do what you want. I am not precluding you.

MR. HOPGOOD: Mr. Geis, do you consider Hunting World competitive with Abercrombie & Fitch in the area tha we have been talking about?

A Yes, I do.

Q In the course of your regular business and duties have you ever had occasion to learn of any customer and his reaction to your goods marked "Safari"?

A Yes.

MR. WELS: Would you repeat the question? I didn't hear it.

THE COURT: Has any customer of his, in substance

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he is asking has any customer of the company brought the use of the name "Safari" by anybody else to his attention?

MR. HOPGOOD: No, I didn't say anybody else, your Honor. I am talking about a customer and his expression to Mr. Geis of recognizing products through the Abercrombie & Fitch use of the mark Safari.

THE COURT: Well now, that is hearsay and you know it.

MR. HOPGOOD: I am talking about his in the normal course coming across this.

THE COURT: He is going to tell us what somebody else's reaction of -- said his reaction was. What is generally done is you generally bring in shoppers or you bring in people in the trade other than him to testify to that.

However, if you want to put this question I will take it.

MR. WELS: I would object, your Honor.

THE COURT: Overruled.

Q Do you understand the question, Mr. Geis?

THE COURT: Would you read the question?

(Question read.)

THE COURT: Answer yes or no.

A Yes.

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Q Can you state the nature of your knowledge, your direct knowledge?

THE COURT: No, what was it? Not the nature of it. What was it?

Q All right, what was the --

THE COURT: When did this happen, where did it happen.

Q What was the occasion?

THE COURT: Who brought it to your attention?

A On numerous occasions customers have talked to me about Abercrombie merchandise in general and the Safari merchandise in particular. They have expressed a feeling of confidence in the Safari merchandise that is sold in Abercrombie & Fitch. In fact, they bought it before and they were buying it at the time they visited the store.

Q And they brought this to your attention directly?

A In conversation, yes.

Q With the customer?

A Yes.

Q Roughly how often has this occurred? You are not in sales I know.

A No. But it usually happens on a Saturday when I'm in as the officer in charge of the store. It's happened on many occasions. I couldn't recall specifically how many.

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MR. HOPGOOD: No further questions, your Honor.

THE COURT: All right. Mr. Wels.

CROSS EXAMINATION

BY MR. WELS:

Q Mr. Geis, can you give us one specific instance where you had such conversation with the customer?

A Yes. I can't give you the date, Mr. Wels.

Q Well, give us an approximate time.

A Well, the last instance I could remember, about a month ago a customer wanted to see an officer of the company because he had bought some merchandise and it wasn't ready on the day promised. The customer came to my office and told me about it. I made the necessary call to the floor to get the customer taken care of. During the course of the conversation the customer sitting in my office recited that he been a customer in Abercrombie for some time and he was particularly a customer that bought our Safari merchandise. I think he was interested in this particular case in Safari trousers.

That was the last instance, Mr. Wels. There has been others. I can't specifically recall the dates.

Q Mr. Geis, with respect to Exhibit 47, which is the summary of advertising expenses for the fiscal years ended January 1970 to 1973 which you testified you prepared

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last night --

A Yes.

Q Incidentally, with respect to the year 1973 do I understand from what you said that that covers the calendar year 1972 and up through January of 1973?

A That's correct.

Q It doesn't cover the period thereafter, in other words. In respect to these four years, one of the last references is, less vendor participations?

A Yes.

Q You recall Judge Ryan going into that with you?

A Yes.

Q To what did you refer in making your computations as to the vendor participations?

A I am not quite clear what your question is.

Q In other words, you show here that for the year 1973 there were participations by vendors of $336,134. How did you get that figure? What records did you refer to to get that figure?

A We have a subsidiary record as part of our general books of account that show expenses and credit of the advertising department by each category. We in fact have one account, No. 934038 currently which reflects credits from vendors for advertising purposes.

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Q Does that record carry the name of each vendor who makes a contribution to this expense?

A That record does not. There would be records supporting that that would show the name of vendors, yes.

Q Those records would be under your control?

A Not under my direct control, but --

Q You are the chief financial officer of the company, are you not?

A That's right, yes.

Q So that they are available to you?

A They are available, yes.

Q You can send for them and they are there?

A Well, not that quick, but they are available.

Q You also testified yesterday, as I understand it, when you are talking about vendors you are referring to the manufacturers of the -- who supply you with particular equipment?

A That's right.

Q Particular goods.

Yesterday in response to a question from Judge Ryan you testified that the bulk of the goods which you market under your Safari trademark registrations is manufactured for you by others and not manufactured by Abercrombie & Fitch itself; do you recall that?

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A That's correct.

Q Can you tell us the names of the veniors who make that Safari goods and garments for you?

A Yes, I know one manufacturer that makes Safari goods for Abercrombie, and that is a company called Willis & Geiger. I don't know whether there are any others, Mr. Wels, that is the one that comes to my mind.

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Q What does Willis & Geiger make for you? Do they make your Safari garments? Do they make the Safari bush jackets, or the Safari trousers, or the various things that were received in evidence?

MR. HOPGOOD: Your Honor, I would like to object to the form of this kind of question. It is an attempt to develop some kind of a self-serving record to make the witness adopt it. I assume, and I think the record should show, that the testimony has been that these items are al --

THE COURT: Counselor, I don't like extended arguments on objections. Your objection is overruled. This is cross examination.

Go ahead

A Could you repeat the question?

THE COURT: Cut your questions down shorter, don't make speeches either.

MR. WELS: Yes, sir.

THE COURT: There is something to Mr. Hopgood's objection.

MR. WELS: Sorry, your Honor.

Q In terms of Willis & Geiger who are one of these manufacturers, how much did they contribute in 1973 to your advertising costs?

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A Offhand I don't know.

THE COURT: Were they any set percentage that suppliers would contriubte?

THE WITNESS: No. It's on an individual basis. I would add --

THE COURT: Is there any set percentage in proporition to the cost of the ad or the amount of merchandise bought from any given supplier? Is that one of the bases?

THE WITNESS: That might be a basis. I wouldn't say it's a uniform basis throughout.

THE COURT: If somebody received an order, say, of $2,000 for a certain item and you were running an ad he might contribute say 10 per cent of the gross bill?

THE WITNESS: Usually in our experience, and I am not an advertising man, but my understanding is that in many instances the vendor will agree to pay for an ad, or for half an ad irrespective of whether you buy a large quantity or not.

In other instances a vendor might give you a percentage, 5 per cent of what you buy to be used for advertising. It varies. And I wouldn't want to state something that is inaccurate.

You are saying there is a regular pattern.

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It varies. At least to my knowledge and experience.

THE COURT: You might be violating the Patman Act.

THE WITNESS: I keep track of that. I don't think we are.

BY MR. WELS:

Q In any event, Mr. Geis, you had said when Mr. Hopgood was questioning you that you had only been able to go back because of the shortness of time to 1973, 1972, 1971 and 1970, and I understood that you are going to go back and prepare similar computations for prior years.

A That's correct, Mr.Wels.

Q Now, I would also request that at the time you do this you refer to your records and you tell us and you obtain for us a record of what the contribution or participation you received from Willis & Geiger to these expenses in each of the four years that you have here, and also in each of the other years as to which you are going to compare these figures.

Can you do that?

A Sure, I can do that.

Q You also have identified various shoes as being sold by Abercrombie & Fitch.

I refer particularly to Exhibit No. 9, the women's Safari Oxford. Could you tell me who

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manufactures that for you?

A No, I cannot.

Q Can you tell me how much the manufacturer of the women's Safari Oxford contributed to these things? To those advertising costs?

A No, I couldn't.

I don't know the name of the manufacturer.

Q Well, will you ascertain this for us?

A Oh, I see what you mean. You had better give me a piece of paper so I can make a note of these requests.

Q Yes, sir.

A The specific Oxford, Mr. Wels, please?

Q The women's Safari Oxford which has been received as Exhibit No. 9, Mr. Geis.

MR. HOPGOOD: Perhaps we had better see if we can give him a code number to help him identify it. Here is the item, if it helps you (handing), Exhibit No. 9.

A Yes, I will ascertain the vendor that supplied Abercrombie with the Safari Oxford style WP618, identified as Exhibit 9, and also how much -- or, show how much money was contributed by that manufacturer to advertising participation during the four years included in my summary and the previous years that I am going to prepare.

Q Yes. Now, there was also received as Exhibit 10

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a rain hat which also I think was referred to by Mr. Hopgood or yourself as a round hat and as a soft hat for general outdoor use.

Do you know who manufactures that for Abercrombie?

A No, I do not.

Q I would also request that you ascertain who that was, and you ascertain for us the contribution made by that manufacturer.

THE COURT: Why are you having the witness do all that business?

MR. WELS: Well, your Honor, I think that this is extremely important because of the fact that Mr. Hopgood and Mr. Geis have attempted to create an impression here that a very large expenditure made by Abercrombie & Fitch for advertising in these years was made -- give the impression that this was created for the purpose of the Safari line. What we are trying to demonstrate to your Honor is that the Safari line was a very small part of this.

THE COURT: Mr. Wels, you testified that the Safari clothing items amount to 10 per cent of the clothing that was sold by Abercrombie & Fitch. I inquired about this as to whether or not there was an exclusive, I wanted to find out whether there was control of

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the Abercrombie & Fitch labels which were alleged by -- the witness has testified that they do have controls on the labels, and while they don't have an exclusive on some of these items they will not buy the item if it doesn't come up to their standards of quality and merchandise, manufacturing and general tailored appearance.

Now you are getting into whether or not they contributed to each one, how much they contributed. It is getting a little far afield.

All right, go ahead.

MR. WELS: Your Honor, to save time instead of going into all of these items I would like to put it --

THE COURT: He is going to give you the items on these two.

MR. WELS: On these two. And to the extent that he can, the extent of the participation by the manufacturers of the Safari type items.

THE COURT: All right. That is not unreasonable.

THE WITNESS: Now I wanted to get the information on this particular hat, though, Mr. Wells. Is that one that you wanted?

THE COURT: He wants to know the name of the manufacturer, how much you bought from him, how much he

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contributed.

THE WITNESS: Right.

MR. WELS: Yes, sir.

THE COURT: You don't want to find out whether or not this manufacturer was given any free meals, do you?

MR. WELS: No, I don't care about that, your Honor.

Q You also referred to Exhibit No. 11, the fishing cap, and I would like the same information with respect to that.

THE COURT: No, you have got two. Please, two is enough.

Q Yesterday, Mr. Geis, there was received in evidence as Exhibit 39 a document captioned "Plaintiff's policing of Safari as to clothing, resulting in abatement of infringement, short of litigation."

You are familiar with that?

A Yes.

MR. WELS: May I respectfully have this marked as Exhibit A for identification.

(Defendant's Exhibit A marked for identification.)

Q If you will refer your Exhibit No. 39 you will see that one of the well-known stores in the New York area whom you say you policed and succeeded in obtaining abatement short of litigation in 1967 was Abraham & Strauss.

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I show you an advertisement of Abraham & Strauss appearing in the New York Times for May 10, 1970.

MR. HOPGOOD: This is after the litigation started, isn't it?

MR. WELS: It doesn't make any difference.

MR. HOPGOOD: I just thought I would bring it out.

Q May 10, 1970, with respect to Safari -- advertisement for Safari Jackets, and I ask you if you are familiar with that (handing).

A Am I familiar, do you mean did I ever see this ad before?

Q Yes, sir.

A The first time is right now.

Q Did you ever do anything with Abraham & Strauss in December of 1970 with respect to their use of Safari jackets in their advertisements?

MR. HOPGOOD: Your Honor, we will be glad to check, if we can, but I don't know how the witness can know the answer to that question.

MR. WELS: Your Honor, the witness testified on direct examination yesterday --

THE COURT: Please. The objection is overruled. It isn't even an objection.

Answer the question.

A Yes, could you give me the question?

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Q My question was: What if anything did Abercrombie & Fitch ever do with respect to the --

THE COURT: What steps did you take after you saw this A & S ad?

Q (Continuing) After their advertisement appeared?

A The only one that I remember was the one in 1967. I do not remember ever seeing this one before, the one I have in my hand which is 1970.

Q But you prepared this Exhibit No. 39 which you referred to as Plaintiff's policy of policing of Safari as to clothing, resulting in abatement of infringement, short of litigation.

A That's correct.

Q And you told the Court, or you sought to give the impression to the Court, did you not, thatafter those efforts these stores no longer made use of the word "Safari" in advertising?

A I did not.

THE COURT: He did show that when an advertisement was brought to his attention which might be an infringement he took immediate steps.

I think he also at one point said he only had those matters which were brought to his attention or which he himself noticed.

MR. WELS: But he said he would send them

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on to counsel.

THE COURT: Yes, he would send them on to counsel when they came to his attention, either by his own methods or by somebody talking to him about it.

Is that your testimony?

THE WITNESS: That's exactly correct, your Honor.

Q You also referred on that list to some stores who you had cause to abate their practice with reference to Safari, Macy's.

MR. WELS: I would like to have this marked Defendant's Exhibit B for identification.

(Defendant's Exhibit B marked for identification.)

Q Did you take any steps with respect to the use of Macy's Safari in such advertisement (handing)?

A I don't see any date indicated on this. Do you have a date?

Q I believe that was 1970, Mr. Geis.

A My summary shows an action policing against Macy's to avoid suit in 1969. To my knowledge I am not aware of any other use by Macy's of the Safari trademark. This particular ad --

Q The one in 1969 was in connection with the boy's suit?

A That's correct. The first time I have seen

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the ad that I have in my hand is today.

Q That isn't quite true, is the first time you saw it was today, Mr. Geis, because --

THE COURT: Don't you testify.

You may say to him, didn't you see it on such and such a time.

MR. WELS: May I withdraw that?

THE COURT: Yes.

Q I will point out, Mr. Geis, that this was taken from the exhibit to the affidavits of Mr. Lee and myself on the motion for summary judgment which was served upon your counsel at that time.

A Wait a minute. Was I present then?

THE COURT: No. He says that this paper which he just showed you, which is what exhibit number?

MR. WELS: Exhibit B for identification.

THE COURT: Exhibit B marked for identification, that that was annexed to affidavits that he had submitted in this action when it was before Judge Lasker and defendants had made a motion for summary judgment of dismissal.

He wants to know didn't you see those affidavits that were submitted in support of the motion made by the defendant and wasn't this amongst them.

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THE WITNESS: I can't specifically recall. I don't have a recollection of that item.

Q But in any event, do you recall that you made an affidavit, you made a -- you also made an affidavit on that motion for summary judgment which Mr. Hopgood has quoted this morning.

A It's quite possible -- probable. I just don't recall the article.

MR.HOPGOOD: I must correct that. I haven't quoted from the affidavit. I have only relied upon a few of the exhibits that were annexed to it.

Q This exhibit 39 you also referred to Saks Fifth Avenue as one of the stores in New York who in 1966 you succeeded in restraining short of litigation from making use of Safari terms.

I show you Defendant's Exhibit C marked for identification which was also an exhibit to our affidavits on the motion for summary judgment, Exhibit I, which appeared in the New York Times of May 22, 1970, in which Saks Fifth Avenue advertised, "Our City Safari Hat," and I ask you if Abercrombie & Fitch took any steps with respect to that advertisement (handing).

A Not to my knowledge.

MR. WELS: May I have Exhibits A and B and C marked

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for identification, received in evidence?

THE COURT: Is there any objection?

MR. HOPGOOD: Yes, sir. I think the Court's attention should be drawn to the fact --

THE COURT: Please. Have you any objection? Mr. Wels has asked that these be received in evidence.

MR. HOPGOOD: Well, my objection, your Honor, goes to the relevance of Exhibit B. This, as far as I can see, does not relate to any articles of clothing, and we are in this case expressly within the area of what we have presented as clothing.

THE COURT: Your listings were not only Safari, but also Abercrombie & Fitch, aren't they, as I recall it? On the schedules that you prepared, Mr. Geis?

MR. HOPGOOD: Exhibit 39, your Honor?

THE COURT: Yes.

MR. HOPGOOD: That's just clothing, your Honor.

THE WITNESS: That's just clothing.

THE COURT: But it includes clothing other than Safari clothing, doesn't it?

MR. HOPGOOD: It's our objection that --

THE COURT: Please. I am talking to the witness.

MR. HOPGOOD: Sorry.

THE WITNESS: The items listed on Exhibit 39

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represent Safari clothing.

THE COURT: All Safari clothing, or aren't there some there that aren't Safari clothing.

THE WITNESS: There are shoes, ties. If we talk about clothing as wearing apparel --

THE COURT: Please. You have got listed on there items other than Safari items; haven't you?

The objection is overruled.

(Defendant's Exhibits A, B, C and D received in evidence.

BY MR. WELS:

Q Mr. Geis, I would like to --

THE COURT: Please. In 1961, ties, that means men's ties, doesn't it?

THE WITNESS: That's right.

THE COURT: Was that a complaint that you were making against Broadstreets for using the word Safari?

THE WITNESS: Safari ties.

THE COURT: In connection with ties?

THE WITNESS: That's right.

THE COURT: I didn't so understand your testimony o yesterday. Now, is that so with reference to all the other items including when you come down here to consumer goods on the next page, on page 2, when you come to

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general sense?

THE WITNESS: Yes. All the items on the list were items advertised with the Safari name to them.

THE COURT: Including the swimwear from 1950?

THE WITNESS: That's right.

THE COURT: As I understand it then every item that is on this Plaintiff's Exhibit No. 39 was a complaint where the word "Safari" you claim was improperly and illegally used.

THE WITNESS: That's right. That's right, your Honor.

THE COURT: All right.

BY MR. WELS:

Q Abercrombie & Fitch I believe is located at Madison Avenue and 45th Street?

A That's right, on the corner.

Q Do you know the shop called Paul Stuart also at Madison Avenue and 45th Street?

A Yes, Paul Stuart is across the street.

Q Is Paul Stuart a competitor of Abercrombie & Fitch?

A Yes, they sell men's clothing and so does Abercrombie & Fitch.

Q Do you look in their windows from time to time?

A Yes. I don't make it a habit, Mr. Wels. I look

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in their windows as I pass the store.

Q Do you read their advertisements in the New York Times from time to time?

A Not too often. I usually do not read advertisements.

Q I show you Exhibit D marked for identification which is an advertisement of Paul Stuart, appearing in the New York Times on September 23, 1972 for "Our authentic Safari jacket".

MR. HOPGOOD: Did you say this was 1972?

MR. WELS: That's right.

Q Some of the complaints he made here this morning --

THE COURT: Wait. You have shown him the exhibit. Now ask him the question.

Q The question is: What steps did Abercrombie & Fitch take with respect to the advertisement by Paul Stuart for Safari jackets?

A To my knowledge, none.

Q To your knowledge, none.

MR. WELS: Your Honor, I offer Exhibit D marked for identification in evidence.

MR. HOPGOOD: No objection.

THE COURT: Received in evidence.

We will have to recess now until 2:00 p.m. for

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mag 9a

lunch.

(Luncheon recess taken at 12:45 p.m.)

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AFTERNOON SESSION

2:00 p.m.

H E N R Y G. G E I S, resumed.

THE COURT: You may proceed.

BY MR. WELS:

Q Mr. Geis, will you tell me whether Abercrombie & Fitch subscribes to a clipping service to be informed of advertisements for Safari printed in newspapers and magazines?

A Your question is the clipping service for the purpose of Safari?

Q Yes.

A Not to my knowledge, no. I have never seen any.

Q Does it subscribe to clipping service for other services?

A The Advertising Department has some clipping service, I am not familiar with that, Mr. Wels.

Q Could you ascertain from the advertising department what clipping services they maintain and whether any of those clipping services forward to them the advertisements using the word "Safari" inserted by other advertisers?

Would you add that to your list?

A Yes. Let me add this to the list.

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THE COURT: Why are we going into all these extraneous matters.

MR. WELS: Your Honor, I think this relates to the situation of the knowledge of these other advertisements that we were talking about by these other competitors.

Q Could you tell me whether to the best of your knowledge the Safari jackets sold by Paul Stuart are made by the same manufacturer as the one who makes the Safari jackets for Abercrombie & Fitch?

A I am not really aware of the merchandise that Paul Stuart carries. I couldn't answer that question.

Q Now I show you Defendant's Exhibit E marked for identification which appeared in the Daily News on May 1, 1969, for S. Klein, captioned "Bag a Safari Jacket at a steal of a price" and I call your attention, this is again one of the exhibits to the affidavits on the motion for summary judgment (handing).

Calling your attention to the fact that in Plaintiff's Exhibit 39 you listed S. Klein as one of the purchasers in New York who plaintiff's policing of Safari as to clothing resulted in abatement of infringement short of litigation, and I ask you what if anything Abercrombie & Fitch did about that advertisement (handing).

A I have no recollection of this advertisement here.

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MR. WELS: Your Honor, I offer Defendant's Exhibit E marked for identification in evidence.

MR. HOPGOOD: No objection.

(Defendant's Exhibit E received in evidence.)

MR. WELS: Would you mark this for identification, please.

(Defendant's Exhibit F marked for identification.)

Q I show you Exhibit F marked for identification which was an advertisement of Franklyn Simon which appeared in the New York Times of May 21, 1970 for their Khaki Safari Jacket and pants, and I ask you what if anything Abercrombie & Fitch did with respect to that advertisement for Safari jackets and pants (Handing).

A I have no recollection of this particular advertisement without having reference to any of the files in the office.

MR. WELS: I offer Defendant's Exhibit E marked for identification in evidence, your Honor.

MR. HOPGOOD: May I see it, please.

THE COURT: How many more of these exhibits do you have?

MR. WELS: I have about a dozen more, your Honor.

THE COURT: Let's finish this one first, and I will tell you what we will do.

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MR. HOPGOOD: Well, I can't object to it for what it purports to be, an advertisement that appeared in the paper, but I am trying to find some recognition for it, that is my only trouble.

THE COURT: Apparently it is from the New York Times of Thursday, May 21, 1970, it properly is offered in evidence as an advertisement of Franklyn Simon, particularly because of the wording "Khaki Safari Jackets and pants".

MR. HOPGOOD: Yes. Well, I just satisfied myself--

THE COURT: The objection is overruled. Will be received in evidence.

(Defendant's Exhibit F received in evidence.)

THE COURT: Mr. Wels, I have to call up Washington, and it will take me about five minutes. You say you have 12 exhibits?

MR. WELS: I think about that, sir, yes.

THE COURT: All right. Have them marked for identification, each one of them separately, let Mr. Hopgood look at them so that when I come out we will take one by one by one and he will already have had an opportunity to look at them and we won't waste a lot of time. In the meantime I can get this telephone call over to Washington and I will be out in about five minutes.

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(Brief recess.)

THE COURT: Are you ready?

MR. WELS: Yes, your Honor.

THE COURT: All right.

BY MR. WELS:

Q Mr. Geis, I show you Defendant's Exhibit G marked for identification being an advertisement of Saks Fifth Avenue, appearing in the New York Times for March 18, 1973 for "The Safari Suit" and I ask you if anything was done by Abercrombie & Fitch with respect to that (handing).

A Without reference to my file, I would be unable to recall this specific item.

Q You have no specific recollection of that?

A No, I have made no check of the file.

Q All right. I call your attention, Mr. Geis, to --

THE COURT: Do you want to offer that in evidence?

MR. WELS: Yes, sir.

THE COURT: Is there any objection?

MR. HOPGOOD: No, sir.

THE COURT: It is conceded that this is a published ad.

MR. HOPGOOD: Of course I must do that, your Honor.

THE COURT: All right.

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(Defendant's Exhibit G received in evidence.)

MR. WELS: I invite your Honor's attention to the fact that Saks Fifth Avenue, the advertiser there, is one of those appearing on Exhibit 39 who --

THE COURT: I want to call this to your attention, Mr. Wels; this case with reference to your client is quite different than Saks Fifth Avenue. Here your client is charged with specifically infringing the copyright, and also is charged with representing that it had the right to use Safari as a trademark. I shouldn't say copyright, I should say registered tradename.

MR. HOPGOOD: Trademark, sir.

MR. WELS: Not, your Honor, that it had copyrighted it, but that it was a descriptive word which it or anyone else could use.

THE COURT: But as appears from the lining of the hat --

MR. WELS: That was only with respect to Minisafari which concededly was a coined word.

THE COURT: Your client unquestionably used Safari with the letters TM after it.

MR. WELS: I think your Honor will find that it didn't do that with Safari alone. It did that with respect to the one word, Minisafari.

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THE COURT: All right.

MR. WELS: But not with Safari.

THE COURT: All right.

MR. HOPGOOD: Your Honor, it has also happened in the case of Safari Land, "TM." Among the various exhibits we put in.

THE COURT: All right.

MR. WELS: But apart from that.

THE COURT: All right. Continue with the exhibits.

BY MR. WELS:

Q I show you Defendant's Exhibit H marked for identification being an advertisement of Bergdorf Goodman for a "dash and daring Safari jacket." And I ask you if anything was done with respect to that (handing).

A What was the date of this? It says June -- is that January or June?

Q I believe that was June of 1972, Mr. Geis. We are going to verify the exact date.

A I have no recollection of this.

MR. WELS: I offer Defendant's Exhibit H marked for identification in evidence, your Honor.

MR. HOPGOOD: I can't object that it was published, your Honor.

THE COURT: It may be received in evidence.

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(Defendant's Exhibit H received in evidence.)

Q I show you Defendant's Exhibit I marked for identification which is an advertisement in the New York Times Magazine for February 14, 1971 of Lord & Taylor for Safari Jacket, and I ask you if there was anything that was done with respect to that (handing).

A I have no recollection of this.

Q Is Lord and Taylor a competitor of Abercrombie & Fitch in terms of women's clothing?

A In terms of women's clothing, yes.

MR. WELS: I offer Defendant's I marked for identification, in evidence.

MR. HOPGOOD: I can't object if the item was published, your Honor.

THE COURT: It may be received in evidence.

(Defendant's Exhibit I received in evidence.)

Q I show you Mr. Geis, Defendant's Exhibit J marked for identification being an advertisement of Plymouth Shops for the Safari Jacket, appearing in the New York Times, I am not sure of the precise date (handing).

I believe it is 1971.

A No recollection of this ad.

MR. WELS: I offer Defendant's Exhibit J marked for identification in evidence.

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MR. HOPGOOD: Again, I can't object if the item was published. I will take Mr. Wels' representation as to the date.

(Defendant's Exhibit J received in evidence.)

Q I show you, Mr. Geis, Defendant's Exhibit J marked for identification, being an advertisement appearing in the March 3, 1973 issue of the New Yorker Magazine of Lang Rock for Safari Jacket (handing). Was there anything done with respect to that?

A I have no recollection of this ad.

MR. WELS: I offer Defendant's Exhibit K marked for identification in evidence.

MR. HOPGOOD: Same observation, your Honor.

THE COURT: Same ruling. It may be received in evidence.

(Defendant's Exhibit K received in evidence.)

Q I show you an advertisement appearing in the New York Times which was appended to those 1970 affidavits as Exhibit No. 7, Mr. Hopgood, of Field Bros. and I ask you if anything was done with respect to that (handing).

A Without having an opportunity to review my file I have no immediate recollection of it.

MR. WELS: I offer Defendant's Exhibit L marked for identification in evidence.

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MR. HOPGOOD: Same observation, your Honor.

(Defendant's Exhibit L received in evidence.)

Q I show you Defendant's Exhibit M marked for identification which is an advertisement appearing in the New York Times of December 19, 1969, of Safari Furs, and I ask you if anything was done with respect to that (handing).

A I have no recollection of this ad.

MR. WELS: I offer Defendant's Exhibit M marked for identification in evidence.

MR. HOPGOOD: May I see that, please.

MR. WELS: Yes, sir (handing.)

MR. HOPGOOD: One moment. Your Honor, I would like to object to this one, Defendant's Exhibit M, as being irrelevant to clothing. It says nothing about clothing.

MR. WELS: I won't press that one. I withdraw that one, Mr. Hopgood.

Q I show you Defendant's Exhibit N marked for identification, which was an advertisement from the New York Times Magazine of March 18, 1973 for a Safari Bag available at Abraham & Strauss and Bloomingdales, and I ask you if you did anything with regard to that (handing).

A I have no recollection of having seen the ad before.

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Q It's not a handbag, that's a piece of --

A Carrying, yes. I have no recollection of seeing that ad before.

MR. WELS: I offer Defendant's Exhibit N marked for identification in evidence.

MR. HOPGOOD: Again, your Honor, this is not an article of clothing and I would have that kind of an objection.

MR. WELS: In your papers you do refer to luggage as well, Mr. Hopgood. In the complaint.

MR. HOPGOOD: In the complaint?

MR. WELS: Yes.

MR. HOPGOOD: The asserted registrations are with regard to clothing. I made a point of that on the direct case.

THE COURT: One of your federal registrations, does it also include luggage?

MR. HOPGOOD: Yes, your Honor, but I am not pressing that --

THE COURT: I don't care whether you press it or not, it is included in your registration, isn't it?

MR. HOPGOOD: Not the registration we put in evidence, your Honor. The registration we have in -- I am trying to be very clear of that, your Honor. We do have a

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registration for Safari for luggage. It's not one of those which we have put in evidence, it's not one of those which is in the complaint.

THE COURT: I see here --

MR. HOPGOOD: I would say it's irrelevant to clothing, that's my objection.

THE COURT: Exhibit 1, Exhibit 3, Exhibit 5, Exhibit 7 and then -- I am going to take it. Your objection is overruled.

MR. HOPGOOD: May I call your Honor's attention to the classes inwhich the various registrations apply?

THE COURT: Yes.

MR. HOPGOOD: These are the ones which are in evidence.

THE COURT: I know. I know. I am taking this in evidence. You have an exception.

(Defendant's Exhibit N received in evidence.)

Q I show you Defendant's Exhibit O marked for identification, Mr. Geis, and calling your attention to the fact that in Plaintiff's Exhibit 39 you refer to succeeding an abatement by Bonwit Teller for a space or room in the store where sportswear clothing was displayed for sale. Exhibit O marked for identification which appeared in the New York Times on April 4th, 1973, was for Bonwit's Safari

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room.

Was anything done with respect to that (handing).

A Without checking my file I would have no recollection of having seen this ad before.

MR. HOPGOOD: Did you date that one, Mr. Wels.

MR. WELS: April 4, 1973.

I offer Defendant's Exhibit O marked for identification in evidence.

MR. HOPGOOD: I have the same observation, I can't deny it was published.

THE COURT: Overruled.

It will be received in evidence.

(Defendant's Exhibit O received in evidence.)

Q I show you Defendant's Exhibit P marked for identification, Mr. Geis, being an advertisement of Arnold Constable for a Swashbuckle Safari which appeared in May of 1970 with one of those exhibits attached to the summary judgment affidavits, Mr. Hopgood, and I ask you if anything was done with respect to that (handing).

A I have no recollection of this advertisement.

MR. WELS: Your Honor, pointing out that Plaintiff's Exhibit 39 referred to Arnold Constable who was one of the people who were abated -- abated their advertising for shoe travel and polishing kits, I offer this

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in evidence, your Honor.

MR. HOPGOOD: I have the same objection to the item not being related to clothing.

THE COURT: Received in evidence.

(Defendant's Exhibit P received in evidence.)

Q Is Bergdorf Goodman a competitor, Mr. Geis?

A In some lines of women's clothing. Not outdoor clothing, but some lines of women's clothing.

Q I show you Exhibit Q marked for identification being a page of the New York Times of July 13, 1972 with an advertisement of Bergdorf Goodman for a supple safari, and I ask you whether Abercrombie & Fitch did anything about that (handing).

A I have no recollection of seeing or hearing about this ad prior to today.

MR. HOPGOOD: I can't object, the item was published, your Honor.

THE COURT: Received.

(Defendant's Exhibit Q received in evidence.)

Q Mr. Geis, I show you Defendant's Exhibit R marked for identification which is an advertisement appearing in the New York Times on April 15, 1969 by Arnold Constable which is apparently similar to the other Arnold Constable advertisement which we saw just a little

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while ago, except here the soft safari is in bold capital letters, and I ask you if you did anything with respect to this (handing).

A I have no recollection of seeing this ad before.

MR. WELS: I offer Defendant's Exhibit R marked for identification in evidence.

MR. HOPGOOD: I can't object, the item was published.

(Defendant's Exhibit R received in evidence.)

MR. HOPGOOD: Did you state the date of that, Mr. Wels?

MR. WELS: Yes, I did. That was the New York Times, April 15, 1969.

Q I have here advertisements from the New York Post for February 13, 1970, Defendant's Exhibit S for identification, making reference to Bonwit Teller's Safari Room, and I ask you if you had taken any steps with respect to that (handing).

MR. HOPGOOD: I might say I want to object the way you have handed it up. There are two different things there, I believe, marked S-1 and S-2, and I couldn't get a date out of you as to one of them, that's why I had --

MR. WELS: I am sorry. They both refer to the Safari Room and we will have to identify the publication

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the second one appeared in.

THE WITNESS: Which one are you asking about?

Q This one here and this one here (indicating).

A I have no recollection of seeing either one of these before.

MR. WELS: I offer Defendant's Exhibits S and S-1 for identification in evidence.

MR. HOPGOOD: Without a date, your Honor, I think I have a good objection.

THE COURT: The objection is overruled.

(Defendant's Exhibits S and S-1 received in evidence.)

Q Mr. Geis, in Plaintiff's Exhibit 39, the one referred to as Plaintiff's policing Safari clothing, you have a reference, Bonwit Teller, space or room in store where sportswear clothing was displayed for sale (1966).

Do you have specific recollection of that particular incident?

A In this respect, Mr. Wels: That for purposes of preparing this list I went through the correspondence we had in the file up to the date of litigation, which I believe was January of 1970, and so the items that I have had listed on here, items up 'til 1970 that I had in my file. Now, with respect to those I didn't recall it could be after, I didn't look or -- I don't have any specific

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recollection without looking at the file as to the precise item or nature of the complaint.

I do know that in our file we have papers relative to correspondence objecting to the use of this Safari name with Bonwit Teller or any of the other people here.

Q Do you recall the specific complaint with respect to the --

A Not offhand.

Q (Continuing) -- the room at Bonwit Teller? cx

A No, I don't. I could say it was a room based --

Q I don't want you to say anything if you don't recall.

A I don't reca-l this particular one here, no, I don't.

Q I take it you would not recall the 1968 incidence with Arnold Constable to which you make reference here?

A I do remember we had some incidence on ladies shoes and the shoe polishing travel kit, but the exact article, or what the correspondence contains, I don't remember at this time.

Q Now, I show you Defendant's Exhibit T marked for identification which is an advertisement for Safari outfits

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by Enka appearing in the New York Times Magazine August 13, 1972, specifically on page 21, and I ask you if you did anything with respect to that (handing)?

A I don't recall the ad or the name of the company.

MR.HOPGOOD: I can't object that it was published, your Honor.

MR. WELS: I offer Defendant's Exhibit T marked for identification in evidence.

THE COURT: It will be received in evidence.

(Defendant's Exhibit T received in evidence.)

Q Mr. Geis, I show you Defendant's Exhibit U marked for identification which was an advertisement appearing in the New Yorker Magazine for the Safari Coat by Jerold, and I believe that it had to be in 1970 because of the fact that it was annexed to an exhibit, the summary judgment motion papers, and I ask you if there was anything that you ever did about that (handing)?

A I have no recollection of this advertisement, Mr. Wels.

MR. WELS: I offer Defendant's Exhibit U marked for identification, in evidence.

MR. HOPGOOD: I can't object it was published, your Honor.

THE COURT: Received.

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(Defendant's Exhibit U received in evidence.)

THE COURT: Now I show you Defendant's Exhibit V marked for identification which is an advertisement for Safari suits appearing in Fortrell Fabric, appearing in the New York Times of June 21, 1970 and I ask you if there was anything that was done with respect to that (handing).

That too was part of the exhibit to the motion papers.

A I have no recollection with respect to this advertisement.

MR. WELS: I offer Defendant's Exhibit V marked for identification in evidence.

MR. HOPGOOD: Same comment.

THE COURT: It will be received.

(Defendant's Exhibit V received in evidence.)

Q I hand you an advertisement appearing on the New York Times page 9 for Wednesday, June 24, 1970, by Saks Fifth Avenue referring to Safari, and I ask you if there was anything that you people did about that (handing).

A Well, I don't recall having seen this or having anyone brought it to my attention.

MR. WELS: I offer the exhibit marked for identification in evidence.

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MR. HOPGOOD: Same comment.

THE COURT: It will be received.

(Defendant's Exhibit W received in evidence.)

Q Mr. Geis, I show you Defendant's Exhibit X marked for identification, page 116 of the New York Times Magazine for September 16, 1973, making reference to Safari coats available at Abraham & Strauss, and I ask if there was anything that you did with respect to that (handing)?

A I have no recollection of seeing this advertisement.

MR. WELS: I offer Defendant's Exhibit X marked for identification in evidence.

MR. HOPGOOD: Same comment.

(Defendant's Exhibit X received in evidence.)

Q Abraham & Strauss is also one of the stores referred to on Plaintiff's Exhibit 39 where policing by Abercrombie & Fitch resulted in abatement of infringement.

I show you Defendant's Exhibit Y marked for identification which is also a New York Times Magazine Ad of September 16, 1973, page 30 making reference to a Safari suit available at Neil's, and I ask you if you did anything with respect to that.

A I have no recollection of ever seeing this ad

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before, nor have I heard the company, Neil.

MR. WELS: I offer Defendant's Exhibit Y marked for identification in evidence.

MR. HOPGOOD: Same comment.

(Defendant's Exhibit Y received in evidence.)

Q I show you Defendant's Exhibit Z marked for identification being an advertisement for Safari Land Holsters and accessories appearing in Gun World Magazine for April 1970, and I ask you if Abercrombie & Fitch did anything with respect to that use of Safari Land (handing).

A I haven't seen this. I have no recollectionof having seen this advertisement before, Mr. Wels.

MR. WELS: I offer Defendant's Exhibit Z marked for identification.

MR. HOPGOOD: I object to this, your Honor. It is unrelated to clothing.

THE COURT: Overruled. I will take it.

(Defendant's Exhibit Z received in evidence.)

THE COURT: Are you down near the bottom of that barrel now?

MR. WELS: Three more to go, your Honor.

Q I show you Defendant's Exhibit AA marked for identification, being an advertisement from the New York Times of July 23, I believe it was 1972, but I am not

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positive about the year, of Rogers Peet referring to a Safari style belted jacket, and I ask you if you did anything about this (handing)?

A I have no recollection of having seen this before.

MR. WELS: I offer Defendant's Exhibit AA marked for identification in evidence, your Honor.

MR. HOPGOOD: I can't object to it, it was published.

(Defendant's Exhibit AA received in evidence.)

MR. WELS: Defendant's BB marked for identification is mistakingly a duplicate of that, so I will not make the offer.

Q I show you Defendant's Exhibit CC marked for identification which is an advertisement of Rogers Peet again in the New York Times for Sunday, May 10, 1970, with advertisements for the Safari look, the Safari zip-front jacket, and I ask you if you did anything with regard to that (handing).

A I haveno recollection of this ad, Mr. Wels.

MR. WELS: I offer Defendant's Exhibit CC marked for identification in evidence.

MR. HOPGOOD: I can't object if the item was published.

(Defendant's Exhibit CC received in evidence.)

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MR. WELS: That completes that series, your Honor. If I may just have a moment.

Q Mr. Geis, this morning and yesterday, Mr. Hopgood, in his questioning of you, made reference to trademarkings in terms of Safari, and I believe the generic use of the term Safari.

Do you know what the differen is between trademark use and generic use?

A I don't feel qualified to answer that question. I think it is a technical question that I feel uncertain of and I would rather not try to draw a conclusion myself.

Q Well, when Mr. Hopgood made reference to a generic use --

MR. HOPGOOD: Your Honor, I must object. I don't believe I used the word "generic" at all.

Q I show you an advertisement of Abercrombie & Fitch appearing in the New York Times on September 7, 1972 --

MR. WELS: I will ask to have this marked Defendant's Exhibit DD for identification.

(Defendant's Exhibit DD marked for identification.)

Q I show you Defendant's Exhibit DD marked for identification (handing).

A Yes.

Q That was published by Abercrombie & Fitch in the

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New York Times, "The supreme Safari ours alone, most significant Safari suit around, our authentic Safari."

I note, I call your attention to the fact that "Blend of finest cotten and dacron polyester"with the letter "R" in a circle after "dacron" but nowheres is there the letter "R" after wherever the word "Safari" appears here.

A That's correct.

Q When do you make use of the letter "R" after Safari?

MR. HOPGOOD: Objection, your Honor. This witness has expressly said he had nothing to do withthe preparation of the advertisements.

THE COURT: Let him complete the question first.

MR. HOPGOOD: I thought he was directing --

THE COURT: He had not put the question yet.

MR. WELS: Your Honor, I will offer --

THE COURT: Put your question to the witness or withdraw it.

Q My question is, you are familiar with the advertising at Abercrombie & Fitch, are you not? You follow it, you read it?

A Yes. I don't even read it that thoroughly.

THE COURT: Let's not go into that again,

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Mr. Wels.

Q Do you remember testifying yesterday with respect to your familiarity with the catalogues that go out?

A Yes.

Q You are familiar with those?

A The catalogues I am familiar with, yes.

Q And in the catalogues on occasion when the word "Safari" is used the letter "R" appears.

A That's right.

Q Do you know what the occasions are when the letter "R" appears as distinguished from when it does not appear after the word "Safari".

MR. HOPGOOD: Objection, your Honor. The question seeks from the witness --

THE COURT: Will you wait just a minute? I have a note here from my clerk.

All right, what is your objection.

MR. HOPGOOD: The objection, your Honor, is that the question seeks from the witness an answer which requires a capability as to which the witness has already disqualified himself. He had nothing to do with the--

THE COURT: The objection is sustained.

MR. HOPGOOD: Thank you, your Honor.

Q Can you tell me what the phrase "The supreme

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Safari, ours alone" conveys to you? What does that mean to you in the advertisement as you read it.

A "Supreme Safari" to me conveys that it's the top quality Safari merchandise. "ours" means it's Abercrombie's alone.

MR. WELS: Your Honor, I offer Defendant's Exhibit DD marked for identification in evidence.

MR. HOPGOOD: No objection.

THE COURT: Received in evidence.

(Defendant's Exhibit DD received in evidence.)

MR. WELS: Would you mark these as Defendant's Exhibits EE, FF and GG for identification.

(Defendant's Exhibits EE, FF and GG marked for identification.)

Q Mr. Geis, I show you Defendant's Exhibit EE marked for identification being an advertisement of Abercrombie & Fitch appearing in the New York Times on Sunday, December 12, 1971 with the caption "Abercrombie is a Christmas Safari."

MR. HOPGOOD: Your Honor, I object to questions about this ad. As far as I can see it has nothing to do with clothing.

THE COURT: Well, he wants to show that it was used in other than as a trademark.

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MR. WELS: Yes, your Honor.

Precisely.

THE COURT: Therefore, he argues that since he used the word "Safari" other than as a trademark, he has that same right, particularly where you don't notice any registration on it.

The objection is overruled.

MR. WELS: Your Honor reads my mind well.

THE COURT: The objection is overruled.

THE WITNESS: What is your question?

MR. WELS: I am going to offer this in evidence.

MR. HOPGOOD: No objection.

THE COURT: Received in evidence.

(Defendant's Exhibit EE received in evidence.)

THE COURT: That seems to be the crux of this whole case, gentlemen. There is no question but what Abercrombie & Fitch have a right, a legal right to the trademark "Safari" when it is applied specifically to an article of merchandise.

But you can't take a word like that in terms used in everyday language to describe -- the whole problem in this case as I see it is not the recognition of Abercrombie & Fitch's right to the word "Safari" as a trademark, but to the wording of an appropriate injunction.

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They are entitled to some injunctive relief, and that is what irritates me a bit.

You men have not concentrated on what I think is the crux of the case. I think it is quite evident Abercrombie & Fitch are entitled to injunctive relief of some nature. What is the extent of it?

What is the wording of it?

You have gone on about everything but that. Go ahead. This is the first piece of evidence that throws light on the problem in this case.

MR. WELS: I have Defendant's Exhibit FF marked for identification, being an advertisement of Abercrombie & Fitch appearing in the New York Times, and I cannot give the precise date, which is, "City Safari with Willis & Geiger's impecable white dacron" with a "R" and "polyester poplin Safari suit," and I offer Defendant's Exhibit FF marked for identification in evidence.

MR. HOPGOOD: You can't give me any general idea as to time.

MR. WELS: I would say it was 1972 or 1973, Mr. Hopgood, but I can't tell you precisely.

MR. HOPGOOD: No objection on your representation.

(Defendant's Exhibit FF received in evidence.)

MR. WELS: I have here, your Honor, Defendant's

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Exhibit GG marked for identification which is also an advertisement appearing in the New York Times apparently on page 2 and this has to be, Mr. Hopgood, in 1973 because on the back of the ad there is a thing that says, "The Vesco case: charges of conspiring to defraud the United States and obstruct justice were handed up against Mr. Stans and Mr. Mitchell".

MR. HOPGOOD: You are not suggesting any connection with that?

MR. WELS: No, I am just trying to give you a date.

This says, "As worn on Safari... the 'salty dog' " and I would offer that as Defendant's Exhibit GG in evidence.

(Defendant's Exhibit GG received in evidence.)

MR. WELS: Would you mark these Defendant's Exhibits HH, II, JJ and KK for identification.

(Defendant's Exhibits HH, II, JJ and KK and LL for identification are marked.)

MR. WELS: Your Honor, I have here Defendant's Exhibit HH marked for identification which was an advertisement appearing in the New York Times on February 22, 1970 --

MR. HOPGOOD: 1972.

MR. WELS: It says 1970. Inserted by

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Abercrombie & Fitch, and referring to one-third to one-half off the original prices on the world's most exclusive roughware cloth designed originally by us for African Safaris, which I offer in evidence.

MR. HOPGOOD: No objection.

THE COURT: Whose ad is this?

MR. WELS: Abercrombie's.

THE COURT: Received in evidence.

(Defendant's Exhibit HH received in evidence.)

MR. WELS: I have here, your Honor, Defendant's II marked for identification which bears the imprint of Abercrombie & Fitch Company, and with respect to the amazing Kalahari Grill.

THE COURT: The which?

MR. WELS: The amazing Kalahari Grill. And which states that Robert M. Lee, the prominent hunter, expedition outfitter and author of the wildly heralded book Safari Day discovered while in Africa's famous Kalahari Dessert, and I offer this in evidence.

MR. HOPGOOD: Objection, your Honor, it has nothing to do with clothing. Why don't you say what it is.

MR. WELS: I did.

MR. HOPGOOD: Did you say it was printed by Hunting World?

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MR. WELS: It bears the Hunting World copyright at the bottom, and it --

MR. HOPGOOD: Just say it's goods other than clothing.

MR. WELS: These are grills to which we had some evidence yesterday with some identification yesterday by Mr. Geis.

THE COURT: I am going to take it in evidence. My point is that by your own actions you have marked out the line that you feel Safari can be used without infringing on your copyright.

MR. HOPGOOD: Your Honor, that was printed by Hunting World.

THE COURT: I don't care who it was printed by.

MR. WELS: It bears the imprint of Abercrombie & Fitch.

THE COURT: All right. Come on, let's get going now, please.

(Defendant's Exhibit II received in evidence.)

BY MR. WELS:

Q Mr. Geis, I show you Defendant's Exhibit JJ marked for identification, and I ask you if you can tell me what this is (handing).

A This is a directory, an Abercrombie & Fitch

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directory. I don't know what year it is.

Q When customers come into the store are there piles of these for the customers to take so they know where to go to find things?

A Well, they are available, Mr. Wels. I don't know whether they are piled up or whether they ask somebody for one. This I don't know.

Q But they are there.

A They are there, yes.

Q They are there for that purpose?

A Yes, that's correct.

Q And the things are listed alphabetically, are they not?

A Yes. And the floor that it's located on.

Q Are there any trademark registrations noted on that page, on that document, that directory?

A Well, there's an item under "S" Safari clothes, ladies, 2, men's 5.

Q But does that have any trademark registration alongside that?

A No, that's just a listing of Safari clothes.

Q So they confine things for Safari, Safari clothes.

A That's right.

There is no identification to a trademark listed

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here, I misunderstood you.

MR. WELS: I would offer Defendant's Exhibit JJ marked for identification, in evidence.

MR. HOPGOOD: No objection.

(Defendant's Exhibit JJ received in evidence.)

Q I show you here Defendant's Exhibit KK marked for identification which is an Abercrombie & Fitch catalogue, its copyright 1971 so I would assume from what Mr. Hopgood said that this was for use in the year 1972 --

MR. HOPGOOD: No, I was talking about what appeared to be the practice for Hunting World. I made no such statement for Abercrombie & Fitch.

Now, this is an Abercrombie & Fitch one, isn't it?

MR. WELS: Yes, 1971.

THE COURT: I told you I am here not to listen to talk between lawyers. Do you have any objection to it, Mr. Hopgood.

Q This is copyright 1971, and it is entitled Abercrombie & Fitch is a Christmas Safari.

I ask you if you are familiar with that, Mr. Geis (handing).

A Yes, I remember when this was published, Mr. Wels, yes.

MR. WELS: I offer Defendant's Exhibit KK marked

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for identification, in evidence.

MR. HOPGOOD: No objection.

(Defendant's Exhibit KK received in evidence.)

MR. WELS: I would like the record to show, your Honor, that the inside cover of this says "There was a time not too many years ago when the only thing people thought of when they encountered the word Safari was a big game hunt led by an expert guide under the broiling African sun. Very dramatic, very expensive. Something very few people could hope to experience. Those Safaris still exist. But now we have a new kind of Safari. A much more pleasurable one. It's a 1971 Abercrombie & Fitch Christmas gift Safari, and it can take place right in the comfort of your own home with this book as your expert guide".

Then it goes on to say, "We hope that you will join in this 1971 A & F Christmas Gift Safari. We know that you will find it richly rewarding."

I will call the Court's attention to the fact that in this catalog, which is 82 pages, references to Safari as such appear to appear only on pages 31 and 32 and on page 71.

I would also call your Honor's attention to the fact that on page 31, item C, appears this entry, "Exclusively

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Abercrombie, the authentic Safari bush jacket teamed with western styled trousers," and there is no trademark identification or registration thereon.

I have here Defendant's Exhibit marked for identification LL-10 being an advertisement of Abercrombie & Fitch appearing in the New York Times for May 23, 1973, and I would offer this in evidence.

MR. HOPGOOD: No objection.

(Defendant's Exhibit LL received in evidence.)

MR. WELS: And I would call your Honor's attention to the fact that this advertisement says --

MR. HOPGOOD: It speaks for itself, Mr. Wels.

MR. WELS: It is in evidence so I can read from it. "We put the mark on the word Safari because we own it".

MR. HOPGOOD: I don't think it was read quite correctly, your Honor. It says "We put the mark on the word 'Safari' " and "R" in a circle because we own it.

THE COURT: What I am going to ask you men to do in this case is submit to me the proposals and counterproposals of provisions for injunctive relief. It might seem advisable for you to get to work at that as soon as you can.

Perhaps we could terminate this case without the necessity of having a lot of appeals later on.

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No sense of having a decree here that is going to be just the beginning of a succession of lawsuits.

MR. HOPGOOD: We will be very glad to cooperate your Honor.

THE COURT: It has to be done in such a way that the Court isn't constantly supervising the use of the word "Safari" in one form or another. So that everytime the plaintiff feels his copyright is violated we get a motion to punish for contempt and we will be hung up with a lot of lawsuits over nothing.

In the meantime about five years from now this Safari business will be out of the window and maybe we will have astronaut suits or something.

MR. HOPGOOD: When would you like it, your Honor.

THE COURT: As soon as you can give it to me. Don't kill yourselves over the weekend. Give it to me next Tuesday if you want.

MR. HOPGOOD: Thank you.

THE COURT: We can't make the Court the umpire of this thing. I am not going to appoint a special master. It's going to cost everybody money. These Safari outfits will be out of the window God knows when. It might be out of the window overnight, who knows. Two years. One year. You get so much time out of this.

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All right.

MR. WELS: We will be very glad to continue our discussions.

THE COURT: Is there anything else now?

Because I have to take my recess now.

MR. WELS: All right, then we will keep the rest until Monday, your Honor.

THE COURT: Do you have anymore?

MR. WELS: I have one more, your Honor, which I would like to mark for identification.

(Defendant's Exhibit MM marked for identification.)

MR. WELS: I will suspend with this, your Honor, until Monday afternoon.

MR. HOPGOOD: I haven't seen it.

MR. WELS: I want to ask Mr. Geis if he could give me the date when it was published, because it doesn't seem to bear a date.

I wanted to ask Mr. Geis if he could tell me when this, if you recall, when it was published (handing).

We know it's an Abercrombie & Fitch publication.

THE WITNESS: You have been unable to find a date in here, Mr. Wels?

MR. WELS: Mr. Hopgood and I have been unable to find a date.

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THE COURT: Have you got a copyright?

MR. WELS: And there is no copyright notice in it.

THE WITNESS: I will be glad to find out.

MR. WELS: May we offer it in evidence and establish the date next week, your Honor.

MR. HOPGOOD: Well, your Honor, I --

THE COURT: All right. Received in evidence.

(Defendant's Exhibit MM received in evidence.)

THE COURT: All right then, gentlemen, until Monday at 1:30 in courtroom 129.

(Court adjourned as above noted, at 3:40 p.m.)

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Abercrombie & Fitch

vs. 70 Civ. 377

Hunting World

New York, New York
December 3, 1973 - 1:30 P.M.

(Trial resumed.)

H E N R Y C. G E I S resumed.

CROSS-EXAMINATION (continued)

BY MR. WELS:

Q Mr. Geis, when we wound up on Friday, Defendant's Exhibit MM having been received in evidence, and at that time you were trying to ascertain when this was published by Abercrombie & Fitch. You told me that you have been able to refresh yourself.

A Could I just see it, Mr. Wels, and make sure?

Q Of course (handing).

A We both were unable to find the date on the catalog itself. However, there is an order blank in the catalog. At the moment I can't even find that.

Q Here it is.

A Each order blank is coded so that when the order comes in we know its date. This is 1971.

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Q Very good.

A As indicated by X71 on the order blank.

MR. WELS: That relates, your Honor, to Exhibit MM.

Q You have also said, Mr.Geis, that if it were possible you were going to try to attempt to find out whether Abercrombie subscribed to aclipping service which informed it of advertisements in which Safari appeared. Have you been able to check into that?

A Yes, I have, Mr. Wels. The advertising department at Abercrombie subscribes to Burrell's Clipping Service. This particular clipping service gives copies of clippings of newspaper articles originating in New York, Chicago, and San Francisco, that pertainto general information that might be in a newspaper column relative to Abercrombie & Fitch.

In other words, it does not give us copy of ads.

For instance, one here is an article "Get High by Flying a Kite."

There is an article on flying a kite and it says, "Certainly a legitimate sport." She says, "Abercrombie & Fitch and Design Research carry them, not just toy stores," that is illustrative of the type of clipping that we would get.

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Here is a few more if you want to see them

Q It does not go so far as advertisements, however.

A No, no advertisements at all.

Q Do the instructions to Burrell include furnishing you with editorial use of the word Safari?

A No. No. Just Abercrombie & Fitch as relates to publicity matters or matters of general interest appearing in those newspapers.

Q You were also going to ascertain, if you could, the extent of the participation in your advertising catalog publishing program by participating vendors of the merchandise that you sold.

Have you done that in terms of the suppliers of the Safari merchandise?

A Yes, I have, Mr. Wels. I obviously didn't have an opportunity to inspect each month for the last ten years, but in general terms, I have ascertained what the proportions of the vendor credits were from the various suppliers we talked about.

Number 1, in particular, was a great deal of our Safari clothing which is purchased from Willis & Geiger. Willis & Geiger has no advertising allowance to Abercrombie. I suppose, no one else either, but we don't

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get any.

Then we had a women's Safari Oxford style WP618, that was in question or that you questioned, Mr. Wels. The vendor happens to be the Safari Topsider Division of Uniroyal. They have a standard policy. They allow 3 per cent advertising based upon 3 per cent of the cost purchases that are made from that vendor.

By looking at our records briefly and discussing it with the buyer, the annual purchases over the past ten years produced an advertising allowance for this particular item of less than $500 per year, Mr. Wels; so that is -- now in addition, we buy other Topsider items that are not Safair, but this $500 only relates to the Safari Oxford.

Now we had a Safari round hat for men that was questioned also, and the manufacturer is Byer Rolnick. That is a little bit more complicated than this one here. They make advertising allowance payments or credits to us, which we can deduct from their bill, or else if we have no bill due, they willgive us a check; and it is based on items appearing in our catalogs. They do not give us newspaper ads. We haven't had any but we have had catalog ads.

Based upon a review of the records and discussion with the buyer, we received somewhere between twelve and $1500 per year for the ten years in question.

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Q Is that in connection with all of their merchandise?

A I am just going to explain that. Approximately one-half of that, of the merchandise purchased from them is Safari. The other half would be non-Safari items. And of the Safari items, there are five style hats that would be involved, or caps, which is the collection we exhibited the other day.

Q Do they make all of those hats?

A They make all those hats, so that there are five style hats that they make for us, and that would have to share basically in one-half of the twelve to $1500 per year.

I think you could appreciate the time element would not preclude a month by month inspection. I hope this gives you information that is helpful.

Q Yes, it does. It is very helpful, Mr. Geis.

Incidentally, is it correct that Willis & Geiger manufacture the Safari cloth which is used in your Safari clothing?

A No, they purchase the cloth for us, Mr. Wels. It used to be manufactured abroad. It is my understanding talking to the buyer that it is manufactured in this country but Willis & Geiger buys it and uses it for our orders. And

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as a matter of fact we used it to make cullottes or anything in our workroom we in turn by it from Willis & Geiger because we don't buy that much that we would buy it direct, so he buys it and stocks it and even sells small quantities to us.

Q There was some reference the other day to the maintenance of quality control. Does Abercrombie & Fitch itself maintain a quality control with respect to their kind of merchandise or is it maintained by your supplier?

A Well, with respect to the merchandise thatWillis & Geiger manufacture for us, there is a joint control maintained by Willis & Geiger and Abercrombie because some of the items that we want in a garment originate from an idea that one of our buyers had.

So that they constantly examine merchandise that is bought from Willis & Geiger to see that it meets their general standards.

Q And Willis & Geiger --but the examination of the stuff that comes into Willis & Geiger from the cloth manufacturer, say, that is maintained by Willis & Geiger?

A That's right, yes. The cloth, he sees that before we do. The only time we see it would be when it is manufactured into a finished garment, unless, for some reason, one of our buyers might go down and see it in a

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raw material bolt form.

I wouldn't know how often that happens.

Q Does your quality control system apply with respect to all of the garments that you get from Willis & Geiger or do you just spotcheck it? How do you do it?

A Well, they buy each item according to the specifications they want. Now Willis & Geiger makes all of certain classifications of merchandise, and they work with the buyer and his staff on almost, you know, a weekly basis, so I couldn't tell you when they examine it. Perhaps when it comes in, but they are satisfied from the long relationship that Willis & Geiger knows the quality that our people want and conforms usually to that quality.

Q I show you Defendant's Exhibit NN for identification, Mr. Geis, which is an advertisement appearing in the New York Times for Monday, December 3, 1973. That is today. This is an advertisement of Sport & Travel appearing on Page 54 of the Times called "For our Tiger Print Vel eteen Safari and bag."

Have you seen that?

A No,I read the Wall Street Journal. No, I haven't seen that.

MR. WELS: Your Honor, I offer Exhibit NN in evidence.

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MR. HOPGOOD: No objection.

THE COURT: Received in evidence.

(Defendant's Exhibit NN for identification was received in evidence.)

Q I show you Defendant's Exhibit OO for identification which appears to be an Abercrombie & Fitch catalog, spring and summer 1973.

You are familiar with this as being an Abercrombie & Fitch catalog?

A That was published in spring, yes.

Q And on Page 29 there are references to Safari items.

A Yes, there is.

MR. WELS: I offer Defendant's Exhibit OO for identification in evidence.

MR. HOPGOOD: No objection.

(Defendants Exhibit OO for identification was received in evidence.)

Q On Page 29, Mr. Geis, Item K on that page is the Safari cloth all-around hat with wide brim for rain, sun protection by the Byer Rolnick, sand cotton 6-7/8 to 7-3/4. Is that the same round hat that we were talking about before? You said that was manufactured by --

A Yes, I think the one we had was a man's hat. Is

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that a men's hat, Mr. Wels?

Q Yes, sir.

A Yes, that would be it.

MR. HOPGOOD: Wait a minute, please. I don't even understand --

MR. WELS: He talked about a contribution from Byer Rolnick for an all-around hat. This is the same thing we spoke about (indicating).

Q I show you Defendant's Exhibit PP for identification. Could you tell us whether this is Abercrombie & Fitch's Christmas catalog for last year?

A Yes, '72 Christmas.

MR. WELS: I offer Defendant's Exhibit PP for identification in evidence.

MR. HOPGOOD: No objection.

xxx (Defendant's Exhibit PP for identification was received in evidence.)

Q I call your attention, Mr. Geis, to Page 54 in this Exhibit PP which relates "How about giving Africa this year? (1) Invitation to Safari; (2), Headquarters Safari; (3) the Zambia Safari Trail; (4) Your own independent Safari, and (5), other than Africa."

Was this the first year that Safari material of this character was included in Abercrombie & Fitch's

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catalogs, to the best of your knowledge?

A Well, Mr. Wels, this particular page here is an advertisement by Adventures Unlimited, which is an agency for travel operating in Abercrombie & Fitch, and I really don't know their policy in putting this ad in.

Q It says "AGents for travel located at Abercrombie & Fitch, New York, San Francisco."

A That's right.

Q You mean they pay Abercrombie & Fitch --

A They rent space.

Q -- for inclusion in the catalog?

A No, no, we give them free space in the catalog, and they pay us rent for occupying the premises.

I don't control their ads other than that we can object to anything that is improper or so forth.

Q I also call your attention to Pages 12 and 13, and here on Page 13, the caption for the page is "Exclusive A & F Gift Safari. Give her the complete Safari outfit for this Christmas."

What of your trademarked Safari items are included in that advertisement, that particular advertisement?

A It would appear none.

Q So that you are using Safari in a descriptive

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sense there, are you not?

A In this particular case it would appear that that is correct, Mr. Wels.

Q Then on Page 12, Item A is "Safari sport coat in light weight 100 per cent cotton, features roomy pockets, horn buttons by Gordon of Philadelphia for us alone."

That doesn't have any registration indication. You are using that in the descriptive sense, are you not?

MR. HOPGOOD: Objection.

THE COURT: Overruled.

A Well, there does not seem to be a Safari item labeled as such. There is a reference to Safari. I don't know whether it is intended to be descriptive or not.

THE COURT: I thought you were going to limit these.

MR. WELS: I am right at the tail end, your Honor.

THE COURT: Pardon?

MR. WELS: I am right at the tail end. I just have two or three more to go.

THE COURT: All right.

MR. WELS: But in connection with the witness' statement, your Honor, that he is not familiar with the difference between descriptive and trademark use of the word, there has been reference to Mr. Geis' affidavit.

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THE COURT: Forget about that, Mr. Wels. I don't think you gathered the full import of my comments Friday.

The witness has testified that when some advertisement was called to his attention, or it came to his attention, either through his own organization, through his own meetings, or from complaints or comments made by customers or buyers or users, he would check over that item. and he would then consult with his legal department or the attorney, and if it warranted action, then he would begin, sometimes writing a letter himself.

I observed, and the reason I commented on it on Friday was that it seems that by their own action, these parties have framed the terms of a consent decree themselves. He doesn't say that these ads which later became the subject of the correspondence which has been introduced in evidence were the only advertisements that came to his attention, but he says "These are the ones that we felt we should take action with reference to."

Those would well fall within the terms of a decree granting injunctive relief.

With reference to the others on which he has no record of having correspondence with the user, one might well be justified, and I think I am justified from the

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evidence in drawing the conclusion that no complaint was made, no correspondence encused because Abercrombie & Fitch felt that efforts to obtain injunctive relief with respect to these advertisements would be unsuccessful.

MR. WELS: Your Honor, what I am talking about here are not advertisements by others. I am talking about advertisements by Abercrombie & Fitch, and uses by Abercrombie & Fitch of in turn a descriptive sense.

THE COURT: Yes, but that just fits in with my comment. Abercrombie & Fitch not only used the word Safari in connection with their trademark, and in connection with specific items of goods, but they used it as a general generic description of word.

MR. WELS: That is the point I was trying to make, your Honor.

THE COURT: You have made it already.

MR. WELS: Thank you.

THE COURT: It is there and I think an analysis of this whole situation will aid you in framing a proper decree, such as Judge Lasker set out to do. Your objection to Judge Lasker's decision was one that primarily seemed to me a procedural objection. Apparently his opinion gives evidence that he just followed along with the reasoning that struck me to be correct.

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However, go ahead.

MR. WELS: I am not going to ask questions about these, but I am just going to offer in evidence --

THE COURT: You were going to study this thing and when were you going to let me know, tomorrow, or Wednesday?

MR. WELLS: This memorandum which was written over the weekend is being typed up today, and it will be submitted to your Honor this afternoon or tomorrow morning depending on when my girls can get it down.

THE COURT: You will give a copy to your opponent?

MR. WELS: Yes, of course, I always do. I would like to offer then in evidence Defendant's Exhibit QQ for identification, RR for identification, and SS for identification; all of which are advertisements of Abercrombie & Fitch, the first being an advertisement in the New York Times and the other two being catalogs.

Q Exhibit QQ for identification, Mr. Hopgood and I have guessed that this is probably 1970 because the order form says T-8/70.

A That would be right.

Q And you have identified this as an advertisement of Abercrombie & Fitch?

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A That is right, New York Times Magazine.

Q And RR for identification, which bears a copyright 1972, is that one of your catalogs?

A Yes, this is a 1972 catalog.

Q And SS for identification, which is called the Blaze Trail 1973, this is also an Abercrombie & Fitch catalog?

A That's right, that was published in September of '73.

MR. WELS: I offer Defendant's Exhibits QQ, RR and SS for identification in evidence.

MR. HOPGOOD: No objection.

(Defendant's Exhibits QQ, RR and SS, respectively, were received in evidence.)

MR. WELS: I have no further questions for Mr. Geis at this time, your Honor.

REDIRECT EXAMINATION

BY MR. HOPGOOD:

Q Mr. Geis, I forget whether the figures that you were asked to develop were brought out and marked as an exhibit. Were they? Didn't you get some figures together?

THE COURT: I don't think they were marked, but he used the paper as he read from it.

MR. HOPGOOD: Thank you, your Honor.

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A This would be it (handing).

Q You have just handed me a sheet bearing columns of entries for the years 1970 -- that is the wrong one. That is one we talked about yesterday.

THE COURT: You were on a yellow piece of paper today.

(Witness hands paper to Mr. Hopgood.)

Q This is for the years '65, '66, '67, '68 and '69?

A That's right, that is previous to this one we talked about Friday.

Q You developed this somewhat along the lines of how the other one was brought out the other day?

A The other one is what?

MR. HOPGOOD: I wish I had the number. I don't.

MR. WELS: I have that, I think, Mr. Hopgood.

MR. HOPGOOD: Exhibit 47 was the one the other day and I would like to mark it as the next exhibit --

THE COURT: It would be nice if you made it 47A and we would have it all together.

MR. HOPGOOD: All right, let's do that, 47A.

(Plaintiff's Exhibit 47A was marked for identification.)

xxx

MR. HOPGOOD: Is there any objection to this, Mr.Wels?

MR. WELS: There is no objection to it, your Honor.

xxx (Plaintiff's Exhibit 47A was received in evidence.)

Q Mr. Geis, I notice this does not have all the refining detail of the previous one. Is that just because you couldn't get the detail in the time available?

A Yes, we had the detail records available for 1970 to '73, and the detail records prior to '73 are over in our warehouse in Moonachie. However, we are in the process of moving from Forest Hills to Moonache, and after leaving the court I discovered that they haven't been unpacked and they are in metal containers. However, I did get the information in total from our 1120, Federal income tax, so that we have figures here that, while they are not in the same detail as the ones for the years 1970 to '73, give the same -- give the total for the respective years 1965 to '69, which was developed in a slightly different technique.

Q So the first row of numbers that you have for these various years are the actual amounts reported to the Federal Government on income tax forms for advertising, is

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that it?

A That's it, listed as advertising on the face of 1120.

Q And to make those figures comparable with totals given in Exhibit 47, is that the reason for these other?

A Yes, I added an estimate of salaries because salaries is classified under Federal income tax with all other salaries and I added an estimate for advertising postage because all postage is grouped under this in the 1120; so I added those in as estimates so that we would have a comparison with the figures that were supported from the detail.

Q Based on your knowledge of the handling of accounts of the company over the years, are the numbers which you have given as grand totals on Exhibit 47A realistically comparable, are they talking about the same things, as the sum total that you have given on Exhibit 47?

A That's correct.

Q Which is that total, which row is it?

A It is the last row on both sheets.

Q You mean after contributions?

A That's right.

Q All right. Mr. Wels had you identify various advertisements and other promotional items of Abercrombie

& Fitch, and among them was Exhibit DD, which I now show you, and noting that this is a garment in connection with Safari, have you any doubt in your mind that the garment which was sold pursuant to the ad had the label sewn into it as you have testified with regard to the other garments marked here in this court?

A All of the garments that are sold as advertised Safari or that are sold in the store as Safari have the Safari label sewn into them.

MR. HOPGOOD: Your Honor, inasmuch as the cross-examination has enlarged the scope of time for use of Abercrombie & Fitch advettisements, I would like to mark and have received as representative three further ads that are in the period since the lawsuit started.

I would like to have received as Plaintiff's Exhibit 67 Abercrombie & Fitch advertisement appearing in the Chicago Tribune January 15, 1971, having to do with Safari shoes.

THE COURT: Any objection?

MR. WELS: No objection.

(Plaintiff's Exhibit 67 was received in evidence.)

MR. HOPGOOD: Next is Exhibit 68, reprint of an advertisement from April 26, 1973, in the New York Times

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having to do with Safari suiting. As I understand, there is no objection to that one.

MR. WELS: Right.

xxx (Plaintiff's Exhibit 68 was received in evidence.)

MR. HOPGOOD: Next is Exhibit 69, a similar reprint sheet from the July 19, 1973 issue of the New York Times, having to do with more Safari clothes. I understand there is no objection to that.

MR. WELS: No objection.

xxx (Plaintiff's Exhibit 69 was received in evidence.)

MR. HOPGOOD: Next, in order to simplify matters, your Honor, I have collected more letters having to do with certain stores as to which there was questioning on cross-examination, and having to do with years, some before, and some after the lawsuit started. They have all been collected and summarized by a summary sheet. I would like to have the whole matter marked and received as Exhibit 70.

The items within this collection go from A to M in one collection. Is there any objection, Mr.Wels?

MR. WELS: I am just glancing at it. It will take a moment.

MR. HOPGOOD: I will represent that they come

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from the files of Abercrombie & Fitch.

MR. WELS: I haven't any objection, your Honor, to this.

xxx (Plaintiff's Exhibit 70 was received in evidence.)

MR. HOPGOOD: No further questions.

THE COURT: You are through, Mr. Wells?

MR. WELS: Yes, I have no further questions.

(Witness excused.)

THE COURT: All right, next witness.

MR. HOPGOOD: Your Honor, we would like to have the record reflect certain parts of a transcript of depositions taken earlier in this action, the deposition of Mr. Lee, who is president of Hunting World, which was taken back in May of 1970, and it has been filed with the Court.

THE COURT: I don't know where it is, but if it is we should have it marked as an exhibit. Indicate to me what you want me to read.

MR. HOPGOOD: Here is what I have done, your Honor. I don't know your preference in how to do this, but I have outlined page and line to page and line, the parts which key in with that.

THE COURT: Have you got the deposition?

MR. HOPGOOD: Yes, sir.

THE COURT: Have it marked for identification.

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MR. HOPGOOD: Very good. I am sorry for its destroyed condition, but the transcript is there. That would be 71.

(Plaintiff's Exhibit 71 was marked for identification.)

THE COURT: Now, what is this Plaintiff's Exhibit 71 for identification? What is it?

MR. HOPGOOD: That is the pretrial deposition.

THE COURT: Of whom?

MR. HOPGOOD: Of Mr. Lee, who is president of Hunting World.

THE COURT: What is his full name?

MR. WELS: Robert H. Lee.

THE COURT: President of Hunting World Corporation, the defendant.

MR. HOPGOOD: That is right.

THE COURT: You don't want to introduce the whole exhibit, is that it?

MR. HOPGOOD: No, sir.

THE COURT: You only want to introduce part of it?

MR. HOPGOOD: Selected parts which I am summarizing on one sheet.

THE COURT: You have summarized that on another sheet?

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MR. HOPGOOD: Two sheets it turns out.

THE COURT: Two sheets. All right, mark that Plaintiff's Exhibit 72.

xxx (Plaintiff's Exhibit 72 was marked for identification.)

THE COURT: Have you got a copy for me?

You are now offering in evidence such portions of 71 for identification which is set forth as excerpts in Exhibit 72 for identification?

MR. HOPGOOD: That is right.

THE COURT: And on Exhibit 72 for identification, you refer to the page and the line number?

MR. HOPGOOD: That is right.

THE COURT: We can do one of two things, proceed one of two ways. I think since this is apparently just a short portion of the deposition, it would be better to read it right into the record.

MR. HOPGOOD: It is very hard to estimate. It might be 25 per cent. I really don't know. I made no effort to summarize that in my mind.

THE COURT: All right, I will read it myself then. I have a copy of this deposition with this and I will read it myself. I will try to do it tonight if my throat gets better.

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MR. HOPGOOD: Your Honor, if it would help any, if you would like to read this --

THE COURT: Have you got it in the record on appeal?

MR. HOPGOOD: It is in the record on appeal.

THE COURT: I don't have a copy of the record on appeal.

MR. HOPGOOD: I know we made a lot of them for the Court of Appeals. They must be around. We will be glad to go and find them in intermission. We will be glad to mark brackets for you.

THE COURT: You don't have to. I will go through it myself and I will mark it myself. Then you will have evidence that I have done it.

MR. HOPGOOD: Let me tell you, your Honor, where you will find it.

THE COURT: I know where to find it. Counsel, I have made up records of appeal as a boy.

MR. HOPGOOD: It begins at Page 272.

Plaintiff reats, your Honor.

THE COURT: All right, plaintiff rests.

MR. WELS: Your Honor, the defendant calls Robert M. Lee.

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ROBERT M. LEE, called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WELS:

Q Mr. Lee, what is your connection with the defendant Hunting World, Inc.?

A I am the president of Hunting World, Inc.

Q And how long have you been connected with Hunting World?

A Since the Hunting World -- since Hunting World, Inc. was founded in 1965.

Q Mr. Lee, what does the word Safari indicate and mean to you?

A Safari is a Swahili word which literally translated means "journey."

Q When did you first go on or first become interested in safaris?

A Well, I have been interested in safaris since I was a boy, and I went on my first safari in 1955.

Q Was that to Africa?

A Yes, it was to Kenya and then colony of Tanganyika, which is now the Republic of Tanzania.

Q Did you thereafter enter into some kind of business relating to safaris?

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A Yes, in 1959, I founded Lee Expeditions, Ltd., a New York corporation, which specializes in arranging big-game hunting and photographic and scientific safaris in Africa.

Q Did you conduct safaris in the course of the business of Lee Expeditions?

A Yes, I did.

Q For numerous people?

A For numerous people and over many years.

Q Did you take them to Africa?

A Yes.

Q Did you make arrangements to outfit your safari clients with the kind of clothing that they needed and equipment they needed for safaris?

A Yes, I did.

Q Where did you obtain that kind of clothing and equipment?

A From various manufacturers in America and abroad.

Q Did you find manufacturers in Africa?

A Yes, our primary manufacturer of our safari clothes is in South Africa.

MR. WELS: Would you mark this as Defendant's Exhibit UU for identification.

(Defendant's Exhibit UU was marked for identification.)

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Q Mr. Lee, I show you Defendant's Exhibit UU for identification, and I ask you if you can tell the Court what that is.

A It is a book, the title of which is "Safari Today," which I wrote in 1960, published by the Stackpole Company, Library of Congress Catalog No. 60-53240.

Q What is the subject matter of that book?

A Safari Today is a very factual handbook on safari. It covers the equipment required or suggested for both hunting and photographic safaris, and covers it in great detail.

It covers photographic equipment, especially recommended for safari use in great detail.

It covers firearms and their design and construction for safari use in great detail, and many, many, many technical points with respect to outfitting and equipment.

It also has a rather thorough coverage on the game animals of Africa and their distribution, and recommendations with respect to the selection of a safari outfitter.

It is a very comprehensive book on the whole subject of safari, written from a factual standpoiht with -- knowing this isn't all personal experience, but rather on the facts of the matter.

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Q Who copyrighted that book, Mr. Lee?

A I copyrighted it.

Q Was the book well received?

A It was very well received and very well reviewed. The reviewers all over the world, the field of London, The American Rifleman, as well as a number of experts, recognized experts, such as Donald Ker, one of the partners of Ker, Downey & Selby Safaris, endorsed the book very nicely.

Jack O'Connor, the world-renowned hunter and editor, shooting editor of Outdoor Life Magazine endorsed the book, and incidentally this book was very well sold by Abercrombie & Fitch Company.

THE COURT: What was the retail price?

THE WITNESS: In those days, your Honor, it was six dollars.

MR. WELS: I offer Defendant's Exhibit UU for identification in evidence.

THE COURT: Any objection?

MR. HOPGOOD: I haven't seen it, your Honor.

THE COURT: Has Abercrombie & Fitch got any in stock?

MR. HOPGOOD: I haven't any idea. I am asking Mr. Wels to give me some so we can --

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THE COURT: Order some from the publisher.

THE WITNESS: It is out of print, your Honor. I am rewriting it now.

Q Do you have any extra copies?

A That is the last copy. The one before was swiped out of my office. That is the only copy.

MR. WELS: We will be glad to loan it to you.

THE WITNESS: Be glad to loan it to you.

THE COURT: I don't know how you expect the Court to read it. I haven't even got a copy of it.

All right, go ahead.

MR. HOPGOOD: May I borrow it?

THE COURT: Take it home overnight.

MR. HOPGOOD: Thank you, I accept the offer.

THE COURT: I read a book like that, sight-reading, it won't take too long.

MR. WELS: Can it be received in evidence?

THE COURT: I can read a book like that -- how many pages? It is about 200 pages, 225, I would say.

MR. HOPGOOD: Just a little over 200.

THE COURT: All right.

MR. HOPGOOD: Some picture pages to help.

THE COURT: Pictures might take longer. I can go over that book and read it thoroughly in less than an

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hour. That is a long time.

MR. HOPGOOD: Maybe I can too.

THE COURT: All right, take your time.

MR.HOPGOOD: I will take it overnight, is that all right?

THE COURT: Yes, certainly, certainly.

MR. HOPGOOD: No objection.

THE COURT: No objection, received in evidence by consent.

aaa Defendant's Exhibit UU was received in evidence.)

THE COURT: Did you read it, by the way, Mr. Wels?

MR. WELS: Yes, your Honor, I did. I not only read it before this case, your Honor, but I read it when the book came out and I am glad to say I got a complimentary copy, which I have.

Q I show you Defendant's Exhibit VV for identification, and I ask you if you can tell us what those are.

A These are our Safari land newsletters which Lee Expeditions, Ltd.published beginning in 1959, and we send them out periodically. They cover our safari operations in Africa. The particular one which was published in --

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Q There are four there.

A All right. The very top one here is a mid-season report dated September 6, 1962, that I wrote while in Southern Angolia, Portuguese West Africa, and it was entitled "Angola, The New Safari Land."

It contains an introduction on the first page from Jack O'Connor, the shooting editor of Outdoor Life, who had just completed a safari in our concessions in Angola, with his wife.

The second piece of literature attached to this exhibit is a business reply card which was sent out to people who wanted to be kept on our mailing list, either for safariland news bulletins, or for Lee Expeditions, Ltd. press releases.

The third piece is an Angola hunting license schedule, which is a synopsis of the hunting regulations then in effect in Angola.

The fourth is a 1962 detailed schedule of rates for big game safaris in Southeast Angola.

Then the next one I see here is a report that I wrote and sent from Angola on December 7, 1961.

THE COURT: Aren't we getting a little far afield now?

Q How long have you been publishing these?

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THE COURT: You haven't introduced this business.

MR. WELS: No.

THE COURT: No, I don't think youought to.

MR. WELS: Your Honor, there is an attack, the complaint seeks relief from using the word safariland.

THE COURT: Yes, but you have covered it with the book.

MR. WELS: This is a specific use of safariland.

A Here we use safariland in one word.

THE COURT: All right, go ahead.

Q Between 1959 whenyou first began publishing the Safariland newsletter and up until the time a complaint was received from Abercrombie & Fitch, in 1969 or 1970, had you ever received any complaints about the use of the word safariland?

A No, I had not.

THE COURT: You claim that you have a property right in Safariland?

MR. WELS: I don't claim that we have a property right in it, your Honor. I claim that we have a right to make use of the term.

MR. HOPGOOD: Your Honor, may I make a remark in answer to your question?

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THE COURT: Yes.

MR. HOPGOOD: Several of the exhibits that we have had marked as Plaintiff's Exhibits, and I can't tell you right off the bat what the numbers are -- I will see if I can find them.

THE COURT: All right, never mind.

MR. HOPGOOD: -- show that the defendant makes use of safariland in emphatic form with the T.M. alongside of it at the foot of its advertisements.

In the New York Times and elsewhere.

I believe it is important that your Honor knows that the defendant has called attention to what it considers a right, a trademark kind of use, so to speak, having to do with safariland.

He just got through saying that East Angola is the new safariland, what is this, geography or is it trademarks?

Here is one, Exhibit 46, Page 83: Safariland T.M., quotes and T.M., having to do with their shop for selling clothing.

THE COURT: All right. I recall seeing it.

Did you ever register the word "Safariland"?

THE WITNESS: No, your Honor.

THE COURT: Do you claim that you have the

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exclusive right to that word in any form or fashion?

THE WITNESS: I claim that I was the first to use it in connection with a retail store or a department of a retail store.

THE COURT: I didn't ask you that. Do you claim that you have the exclusive right to use that word?

THE WITNESS: In that sense, yes, your Honor. In the sense of the Safariland news, no.

THE COURT: Go ahead.

MR. WELS: I offer Defendant's Exhibit VV for identification in evidence.

MR. HOPGOOD: May I see it?

MR. WELS: Yes (handing).

MR. HOPGOOD: No objection.

xxx (Defendant's Exhibit VV was received in evidence.)

Q Do you purchase safari equipment in Africa for resale in the United States?

A Yes, we do.

Q Can you tell us about the nature of the business of Hunting World that is presently located at 16 East 53rd Street, is it not?

A Yes, it is.

Q Will you tell us what kind of business Hunting

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World has?

A Hunting World specializes in the design and sale of a number of specialty groups of merchandise.

One of our areas, one of our merchandise areas is clothing designed for safari use, and made to withstand the rigors of safari and expedition usage.

We also design and have made to our specifications a rather wide range of other sportswear, active sportswear designed for hunting, fishing, expedition useage.

Shoes, we import safari shoes from Africa. We sell quite a wide range of specially-designed hunting boots and hiking boots, climbing boots.

We have manufactured to our own design a very wide range of fine luggage and leather goods, small leather goods, and footwear, most made to our designs and specifications by contractors in Europe, some in Africa.

Q Is the merchandise which you sell at Hunting World related primarily to safari and hunting?

A No, not primarily. A lot of it is, but our merchandise lines are broader and broader now, whereas five or six years ago a much higher percentage of our equipment was of -- of our merchandise line was directly related.

Q You also sell items made of elephant skin?

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A Yes, we do.

Q What sort of items do you sell of elephant skin?

A Well, we sell luggage, leather goods, wallets, billfolds, and quite a wide variety of shoes which are manufactured to our specifications from hides obtained primarily from the Kreuger National Park of South Africa.

We were the first to recover the leather from the animals that the Park has to kill each year as being surplus.

They used to throw that leather away.

Q Do you also sell pictures and artwork?

A Yes, we do.

Q Do they relate to wildlife and hunting primarily?

A Yes, all of the prints that we catalog and sell through our catalog and in the store are reproductions of original oil paintings by David Shepard, the English wildlife artist, and they are all African subjects.

(Defendant's Exhibit WW was marked for identification.)

Q Mr. Lee, I show you Defendant's Exhibit WW for identification, and I ask you if you can tell me what that is.

A This is Hunting World's 1974 catalog, which was published in October of this year, published last month.

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Q How large a circulation does that have?

A Approximately 300,000.

Q How long have you been publishing catalogs?

A Since December 1965.

Q Do you have an advertisement in there for a safari hat?

A Yes, our safari hats are shown on page - let me find it --

Q Would that be on Page 31?

A Yes, on 31.

Q How do you advertise --

MR. WELS: Your Honor, may I offer Exhibit WW in evidence?

MR. HOPGOOD: No objection.

(Defendant's Exhibit WW was received in evidence.)

(Defendant's Exhibit XX was marked for identification.)

MR. WELS: It might be useful, your Honor, and easier if I gave you a copy of this catalog to follow.

Q Referring to Page 31, Mr. Lee, where you advertise authenticity imported from Africa by Hunting World, safari hats for safari country, the white hunter, the hat for safari from Black Africa. I show you Defendant's

Exhibit XX and I ask you if this is the hat which is referred to there as a safari hat?

A Yes, it is.

MR. WELS: Any objection to this?

Q Can you tell us by reference to the paragraph what the catalog number of this one is?

A Number 3011.

MR. HOPGOOD: No objection.

MR. WELS: I offer Defendant's Exhibit XX for identification in evidence.

xxx (Defendant's Exhibit XX was received in evidence.)

Q Mr. Lee, there appears on the label there -- on the inside hat band label -- the word "Dorian." Who is Dorian? Can you tell us what that refers to?

A Dorian is the manufacturer that makes this hat for us in South Africa.

Q Are they located in Johannesburg?

A Yes, they are in a suburb of Johannesburg.

Q Are these hats by Dorian used by people on safari in Africa?

A Yes, they certainly are.

Q Have you yourself worn them on safari there?

A Yes, I have.

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Q YOu have seen them there?

A Yes, I have.

Q Other people use them?

A Many, many other people use them.

MR. WELS: Mr. Hopgood, may I have Plaintiff's Exhibits 10, 11, 12, 13 and 14. They are your hats.

(Exhibits handed to Mr.Wels.)

Q Mr. Lee, in advertising this hat as a safari hat from Safari country, in what sense did you intend to use that term, safari hat?

A In a descriptive sense, trying to convey to the public the fact that this is the traditional-type of safari hat that has been used by sportsmen, professional hunters, and outdoors men generally, in Africa, for many, many, many years, for generations.

Q I show you Plaintiff's Exhibit 11,which has been received in evidence identified as a safari hat by Abercrombie & Fitch, the plaintiff here.

Did you intend, when you advertised your hats as the hat for safari, to be giving the public the impression that this was the same hat as plaintiff's Exhibit 11, the safari hat sold by Abercrombie & Fitch?

A Absolutely not.

Q Did you ever intend to palm off any of your

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merchandise originating with Abercrombie & Fitch?

A Absolutely not. We have developed and built our own image right from the beginning, and while we appreciate and respect Abercrombie & Fitch Company and its merchandise, we have never attempted to lead the public to believe that what we are selling is theirs.

Q Incidentally, on any of the occasions that you have been in Africa on a safari, have you ever seen any person on a safari wearing a hat similar to Plaintiff's Exhibit 11?

A No.

Q Now I show you Plaintiff's Exhibit 13, which is also a hat with a safari label, received in evidence as another example of a safari hat by Abercrombie & Fitch. When you advertised your hats for safari, did you intend to leave the impression with members of the public that this was the same as this Abercrombie & Fitch hat?

A No, I did not.

Q Did you ever see anybody on a safari in Africa or elsewhere wearing a hat like this?

A No, I have not.

Q I also show you Plaintiff's Exhibit s 10, 12 and 14, all of which have also been received in evidence as safari hats sold by Abercrombie & Fitch, bearing their

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safari label.

When you advertised your hats for safari, did you intend to represent to members of the public or lead them to believe that you were selling copies of these safari hats originating with Abercrombie & Fitch?

A Absolutely not. There is no similarity whatsoever between our safari hats and the Abercrombie & Fitch safari hats.

Q I show you, Mr. Lee, Plaintiff's Exhibit 19, which has been received in evidence as an example of your Minisafari hat. Can you tell us essentially -- withdrawn.

Where is that Minisafari hat manufactured?

A This is also manufactured by Dorian of South Africa, but the design is mine.

Q The design is yours. How does the design relate to this other safari hat which has been received as Defendant's Exhibit XX?

A Well, in the style room at Dorian some years ago,I took one of these large hats and cut the brim down and shaped it by hand, and then asked them to do a professional job of it, and it resulted in the Mini-safari which became an overnight sensation in America, in the men's hat industry. In fact, the former hat buyer at Saks-Fifth Avenue told me several years ago that my Minisafari

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saved the American men's hat industry for the season because all the American manufacturers knocked it off.

We in fact through our wholesale company did sell the original both to Saks and Bloomingdales and to some smaller stores.

Q Had hats similar to this ever been sold at that time in Abercrombie & Fitch?

A A hat, one of the copies appears in --

Q At the time of this.

A No, not at that time.

Q Not then at that time?

A One of the copies subsequently appeared in an Abercrombie's catalog.

MR. HOPGOOD: Is there a charge about that against us?

MR. WELS: I don't believe there is.

MR. HOPGOOD: I move that it be stricken.

Q At the time that the Minisafari hat was devised and merchandised, was it your intention to indicate to any members of the public that this was a hat which originated with Abercrombie & Fitch?

A Absolutely not.

Q Was there any hat at that time merchandised or sold by Abercrombie & Fitch which in any way resembled your

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Minisafari hat?

A To the best of my knowledge, no.

xxx (Defendant's Exhibit YY was marked for identification.)

(Defendant's Exhibit ZZ was marked for identification.)

Q Mr. Lee, will you refer to Page 18 of your catalog. You advertise "The safari shoes of Africa are here," and now I show you Defendant's Exhibit YY for identification. I ask you if you can tell us, if you can identify that article for us.

A Yes, this is one of the Kenya safari boots that were in Kenya. It is the traditional safari shoe.

Q When you say it is the traditional safari shoe, can you define for us what you mean? In what sense are you using the word "traditional"?

A Yes, it is the shoe that was developed many, many years ago that is worn by, I am sure I could safely say, better than 95 per cent of the people who go on real safaris, where it could be a little walking is involved.

Q When you have gone on safaris yourself, have you worn a shoe similar to it?

A Just about exclusively over the years, yes.

Q You have seen other people wear these on

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safaries in Africa?

A Just about everybody.

Q Who manufactures these shoes in Africa?

A Well, there are a number of manufacturers. This one is made by a -- one of the Bata factories in Africa.

Q Is this the shoe which is advertised on the lower portion of Page 18 of your present 1974 catalog?

A Yes, it is.

Q And which, you say in this advertisement, "Original safari boots imported from Kenya," these are imported from Kenya?

A Yes, they are.

Q What do you mean when you say they are original safari boots?

A Well,this type of shoe has been copied all over the world. There are excellent to terrible copies of it made by factories in Spain and Greece and England. The most famous copy of it is the Clark's desert boot, which is made inEngland, but these are the originals made in Africa. We think they are made better than any of the copies. We think the materials are also better.

These are made from top grain reversed leather rather than split leather, which is used by Clark's and just about every other copy that I know of. These have

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genuine leather insoles. Most of the copies have composition insoles.

MR. WELS: I offer Defendant's Exhibit YY for identification in evidence.

Q Mr. Lee, Mr. Hopgood has asked whether this is the same or a similar shoe to the one that you produced on your deposition.

A Yes.

MR. HOPGOOD: No objection.

xxx (Defendant's Exhibit YY was received in evidence.)

MR. WELS: Mr. Hopgood, I wonder if you could make available to me your Exhibit 9.

Q Mr. Lee, I show you Exhibit 9, one of the two shoes which comprise Exhibit Number 9, which is an Abercrombie & Fitch safari shoe bearing the label on the back and which was heretofore received in evidence. I show you Plaintiff's Exhibit 9, and I ask you whether at the time that you advertised your Exhibit YY, the Kenya safari shoe, whether you intended to leave with the public the intimation that this was -- your shoe was a copy of the Abercrombie & Fitch shoe, or that your shoe originated with Abercrombie & Fitch?

A Absolutely nothing was intended to lead the

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public to believe that there was any confusion at all between the two shoes. Abercrombie & Fitch's safari marked shoe which I hold in my hand is a yachting or boating shoe and totally unsuitable for use on safari and was never designed for use on safari.

Q Apart from the shores of Africa, have you ever seen anyone in Africa wearing a shoe similar to Plaintiff's Exhibit 9?

A No, I have not.

Q Now I show you, Mr. Lee, Defendant's Exhibit ZZ for identification, and I ask you if you can identify for us what Defendant's Exhibit ZZ for identification is.

A Yes, this is another one of our traditional African safari shoes. It is the one that we call in our catalog the veldt boot, and this rather full last and very round toe style was the forerunner of this class of shoe, and they were first made in South Africa, I would say, in the time of I'd say even prior to World War I, and this particular example is made in Kenya, but we also import the South African model.

Q This is what you call a veldt boot?

A Veldt boot.

Q Have you explained to the Court what a veldt boot is?

A Well, the veldt is an African's word meaning

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bush or the wide open spaces.

And whereas the English usually refer to the countryside in African game fields as the bush, the South Africans say the veldt, so they call it the shoe of the veldt, and I don't speak African, but there is an African word that phonetically sounds like veldtschoen, it is one word, and that is what they call them in African, and that literally translated means veldt shoes.

MR. WELS: I offer Defendant's Exhibit ZZ for identification in evidence.

Q Mr. Lee, with reference to Defendant's Exhibit YY, the Kenya safari boot, how long have you sold these boots under this name?

A I think since 1966.

Q How long have you sold this Kenya boot?

A About the same, '66 or '67.

THE COURT: Take this 1974 catalog.

THE WITNESS: Yes, your Honor.

THE COURT: I note, for instance, on Page 18, that is the page on which you have this veldt boot.

THE WITNESS: Right.

THE COURT: You also have the Kenya safari boot.

THE WITNESS: Yes, your Honor.

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THE COURT: You have at the foot of that page a trademark, that looks like a elephant.

THE WITNESS: Yes, sir.

THE COURT: Hunting World, you have a note there alongside of it, "Our trademark on every genuine Hunting World original is your protection against forgeries. Look for it."

Don't you regard that as your trademark rather than safari?

THE WITNESS: Yes, Hunting World as shown, as depicted there is certainly our trademark, your Honor, yes.

THE COURT: You don't put this Hunting World mark on all your items, do you?

THE WITNESS: We do on just about everything, even on wallets,belts, billfolds.

MR. WELS: Attache cases.

THE WITNESS: The shoes, attache cases, wherever there is room for it we get it on.

THE COURT: This is the identifying mark?

THE WITNESS: That is the identifying mark.

THE COURT: Not safari?

THE WITNESS: Not safari.

MR. WELS: Your Honor, that appears on the cover of the catalog too.

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THE WITNESS: And it appears in the shoes, your Honor.

THE COURT: Why did you then , when you used the word "safari" put the letters alongside of it, in one of these exhibits, I think it is in one of these hats, "T.M."?

THE WITNESS: Minisafari is one word, is a word that I coined to describe the cut down safari hat, the small version of the safari hat.

THE COURT: You still don't answer my question. Why did you put TM on there?

THE WITNESS: Well, because I wanted to protect --

THE COURT: You don't regard it as your trademark?

THE WITNESS: We have more than one trademark, your Honor, and I do regard Minisafari as referred to in that particular hatband as ours.

THE COURT: Did you ever register that name?

THE WITNESS: No, I never registered it.

THE COURT: You knew that in order to get the property right in it, you had to register it, didn't you?

THE WITNESS: Yes, but I didn't think it was any urgency.

THE COURT: Statutory property right.

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THE WITNESS: I did not -- I did know it, but I didn't think there was any urgency or time limit in registering it. I didn't think it was necessary to register it.

THE COURT: You don't impress me as being entirely frank with respect to that. Why did you think it was important for you to register the mark Hunting World with the elephant in it?

THE WITNESS: Well, that is because that is our business. That is our --

THE COURT: Please give me a chance -- and a company with an "R" with a circle around it, and not with any letters T.M., and why did you use the letters T.M. on Minisafari, on your hat?

THE WITNESS: Well "R" indicates that Hunting World is a registered trademark, and T.M., it isn't registered but we consider it as our mark for that hat.

On the next page, your Honor, I have a --

THE COURT: I am concerned with I want to know why you put the letters T.M. on there.

THE WITNESS: Because I consider that the Minisafari in that hat band as applied to hats is our trademark for that type of hat, but not for anything else.

THE COURT: Where did you get that idea of picking

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out those two letters, T.M.?

Why didn't you put R.L. or XYZ?

THE WITNESS: Well, because a trademark attorney many years ago told me to do that.

THE COURT: When?

THE WITNESS: Oh, when I first started in the business, before Hunting World was registered we put a little T.M. in.

THE COURT: What trademark attorney?

THE WITNESS: Pardon?

THE COURT: What trademark attorney told you to put T.M. on it? What trademark attorney ever told you to put that?

THE WITNESS: Steve Baker was the first attorney that I had used in trademark matters.

THE COURT: What bothers me, Mr. Wels, one of the things that bothers me, here your client has a trademark quite distinctive, well and favorably known. His prices are reasonably high, but apparently it is good merchandise. The fact that he used the letters T.M. when he tried to impress people with the fact that he had a property right in some word including safari, makes me feel and draw the conclusion that he knew at that time that he didn't have any such right.

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MR. WELS: I think the distinction, your Honor, is that Minisafari is a coined word where safari is not a coined word so far as a real descriptive word coming in the language for 100 years or more.

THE COURT: It is a question of how it is used. If it is used as a mark, no question in this case but what the plaintiff has a registered property right in the trade mark safari. He probably registered that. You don't dispute it. You concede that he has clear title. It is in your statements, in your briefs, in your pretrial order. I think that is also in there, isn't it?

MR. WELS: Yes.

THE COURT: All right, go ahead. Plaintiff is clearly entitled to injunctive relief. It is simply a question of how that should be framed. That is the only issue in this case as I see it. Plaintiff doesn't claim in this case and there is no evidence to show palming off. There is no claim here by the plaintiff that up to this point -- I have seen none -- no evidence to substantiate that such claims were made that the defendant attempted to palm off its merchandise as being the merchandise of the plaintiff. That is not involved here. The trade name, the right to the exclusive name Abercrombie & Fitch is not in dispute here. The only issue as I see it is the

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extent to which the word safari may be used as a descriptive term.

All right.

THE WITNESS: Your Honor, if I may --

THE COURT: Now, please, you have a very able lawyer here. He is representing you.

Q Mr. Lee, are there any shoes other than Defendant's Exhibit YY and ZZ at this time which you sell as safari shoes?

A Yes, there are several others which are not in our catalog.

Q Can you tell us what those are? Are they similar to or dissimilar to these?

A Several -- well, they are all basically similar in shape. Some are in cowhide suede leathers, some are in calfskin suede leathers, and some are in elephant leather, and the elephant leather ones vary primarily in that the construction is more expensive and more refined, and a couple of the elephant leather ones are in fact shown in this catalog.

Q What page is that, Mr. Lee?

A Page 63, the shoes in the center of that page called elephant hunters, and Page 67, the ones called elephant trackers.

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Q But you do not refer to that in your advertising as safari shoes?

A No.

Q You do not use the word safari in connection with them?

A No, I don't.

Q What?

A I don't.

Q My question is directed to shoes that you merchandise and advertise as safari shoes or shoes for safari.

A Well, actually we do sell these shoes to people going on safari and they are about the finest safari shoe that can be had but they are very expensive.

Q There was a time, was there not, when you also made up your safari --

THE COURT: You say on Page 57 of your catalog, the 1974 catalog, "Bob Lee has personally worn them on several safaris."

THE WITNESS: Yes, your Honor, I wear them myself.

MR. HOPGOOD: Your Honor,I might say that the language your Honor just spotted is language we couldn't possibly complain about.

THE COURT: I am glad we agree on something. I agree too that you couldn't complain about it.

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Q There was a time, Mr. Lee, was there not, when you made up your safari shoe in hippopotamus leather?

A Yes.

Q And at that time it was sold as a Hippo Safari?

A Yes.

Q Do you still do that?

A No.

Q When did you stop that?

A Oh, about the time of this action. I didn't want to do anything to antagonize Abercrombie & Fitch, and although it was a Hippo Safari shoe, we just abandoned calling it that.

THE COURT: Did you abandon it for that reason or did you abandon it because the hippo hide could not be properly dressed to maintain it, properly cured?

THE WITNESS: Oh, it could be very properly cured, your Honor. There is always a problem of supply with hippo hide, but we actually abandoned it because it didn't sell well.

THE COURT: You don't use hippo hide for making belts, do you?

THE WITNESS: We don't, but some people do. If it is chrome tanned, it is very soft and supple, but it is not as good looking as elephant leather and the surface doesn't hold up as well.

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Q Do you find elephant leather unusually heavy?

A No, because we dress it all to about 1-1/2 millimeter. It is up to two inches thick when it is raw, but when it is split we split it to about 1-1/2 millimeters. It is not heavy. It is very, very light.

Q Did you also formerly make up your safari shoe in camel leather?

A Yes, we did.

Q And did you call that at one time a Camel Safari?

A Camel Safari Chukka, I believe.

Q Did you abandon the making and the selling of that?

A We still have some of those shoes in stock, but we ceased promoting them for the same reason as the hippo. They didn't sell well.

Q How long ago did you cease promoting them?

A Several years ago.

Q So the ones you have in stock are just remainders from what you had in stock at that time?

A Yes.

Q Do you also sell or advertise in your catalog clothing for safaries?

A Yes.

Q Where do those advertisements appear in the catalog?

A Pardon?

Q Where do those advertisements appear?

A On Pages 16 and 17.

Q Where else?

A Well, the jacket on Page 3 is very suitable for safari use but I named it the gad-about jacket.

Q I am talking about the things you advertise as safari clothes.

A Page 16 and 17.

MR. WELS: Would you mark these as Defendant's Exhibit AAA, BBB, CCC and DDD.

(Defendant's Exhibits AAA, BBB, CCC and DDD, respectively, were marked for identification.)

Q I show you Defendant's Exhibit AAA for identification, Mr. Lee, and I ask you if you can tell me if you can identify that for me.

A This is one of our safari shirts. It is not in the catalog. It is made to our design in France, out of very fine cotton or gabardine. It is not, incidentally, a color that we recommend for the bush.

Q Do you advertise this as a safari shirt or a shirt for safari?

A We have never advertised this shirt. It is a new shirt, but we, in the store of course, we call it a

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safari shirt.

Q Is it similar to shirts that are worn on safari?

A Yes, it is.

Q Is this a man's shirt or woman's shirt?

A This one is a man's. We make it for women too.

Q Have you worn shirts like that on safari?

A Yes, I have.

Q Seen them worn by others?

A Yes.

THE COURT: Night club safaries?

THE WITNESS: This particular color is not good for safari.

Q I show you Exhibit BBB for identification, and I ask you if you can tell us what that is.

A Yes, this is one of our safari jackets. This happens to be the one that appears on Pages 16 and 17 in the catalog. It is a cotton gabardine safari jacket.

Q Can you tell us which this is on Page 17 or Page 16?

A Number 3069 on Page 17.

THE COURT: Is that $145?

THE WITNESS: Yes, your Honor.

MR. WELS: I offer Exhibit AAA for identification

in evidence.

MR. HOPGOOD: No objection.

(Defendant's Exhibit AAA was received in evidence.)

Q Defendant's Exhibit BBB, this is the safari jacket that you sell?

A Yes. Incidentally our label appears. You opened the bag to show that our label appears under the composition label.

Q That is the Hunting World?

A Yes.

MR. HOPGOOD: May I see that?

(Exhibit handed to Mr. Hopgood.)

Q You testified that shirt was made in France?

A This was made in France.

Q Is this advertised by you as a safari shirt, as a shirt for safari?

A As a safari bush jacket.

Q Safari bush jacket?

A Yes.

Q I think you have testified that in fact it is so used.

A Yes, it is.

MR. WELS: I offer Exhibit BBB for identification in evidence.

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MR. HOPGOOD: No objection.

xxx (Defendant's Exhibit BBB was received in evidence.)

THE COURT: I told you I am going to adjourn at half-past three.

MR. WELS: Yes, sir.

Q Mr. Lee, I will show you Plaintiff's Exhibit 24, which we received in evidence as Abercrombie & Fitch safari jacket. When you commenced selling your safari bush jacket, did you in any way intend to lead members of the public with the impression that this was -- that your safari bush jacket was a jacket, the same jacket as Abercrombie & Fitch's or originated with them?

A No, I did not.

Q Is there any copying of Exhibit 24 in Defendant's Exhibit BBB?

A No, the detailing of the jacket is -- of our jacket is completely different from the detailing of their jacket, and the fit is completely different too.

Q Will you describe the difference between the two jackets to us, Mr. Lee?

A Well, in the detailing, Number 1, they have shoulder epaulets on the shoulders and we do not. The collar style is different. The fit of the jacket is com-

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pletely different. The Willis & Geiger jacket is a very, very full cut garment, a loosely cut garment, and our jacket is a more tailored to the body fit.

In the details of making the jacket, we use two needle sewing on every seam in this jacket. We use a double placket down the front closure, a packet on both sides, and there is roughly two to three times as much sewing in our jacket as there is in the Willis & Geiger Abercrombie & Fitch jacket.

MR. WELS: Your Honor, it is half-past three.

THE COURT: All right. Tomorrow morning at 10:30.

(Adjourned to Tuesday, December 4, 1973, at 10:30 A.M.)

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THE COURT: Don't worry, I will ask for it. I didn't want to put too much pressure on you.

MR. HOPGOOD: It is right here.

THE COURT: What have you got there?

MR. HOPGOOD: I have a proposed decree which would include an injunction.

THE COURT: Will you give Mr.Wels a copy of it.

MR.HOPGOOD: Very good.

THE COURT: Mr.Wels, suppose you look that over during the recess this morning when I recess to take care of my criminal case at half-past 11:00, which should take about ten or 15 minutes, and then tell me when you can give me your answer on that.

MR. WELS: Yes, sir.

THE COURT: This case, the way I see it, is simply a matter that the plaintiff is entitled to relief, injunctive relief. The question is to what extent and the way it is to be worded. That is all.

All right.

MR. WELS: Did your Honor say you wanted to see a copy of Safari Today, the book?

THE COURT: You didn't read it, did you?

MR. HOPGOOD: I read it last night, your Honor, and it is back here again.

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THE COURT: I had to quit last night, but I read half of it already, and I promised to let somebody look at this. You want to look at this? I haven't finished it yet, and I have gone up to Page 52. I have go about five or six more. I can give you this before we get --

MR. HOPGOOD: I am not pushing for that.

THE COURT: This is Safari --

MR. HOPGOOD: This is the book of which there is only one copy extant.

THE COURT: All right, we will take that and I will read that, try to do it overnight. If not, tomorrow.

R O B E R T M. L E E, resumed.

DIRECT EXAMINATION (continued)

BY M R. WELS:

Q Mr. Lee, I show you Defendant's Exhibit GGG for identification, which appears as Exhibit 4 and 4A of your deposition.

I show you this and I ask you if you can tell us what that is, Exhibit GGG for identification, which had been received in your deposition as Plaintiff's Exhibit 4, the English side of it and 4A, the Dutch side, the African side.

A This is an advertising circular produced by

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the Dorian Hat Company in South Africa for distribution in South Africa with respect to its safari hats, and they depict here three hats. The headline is Dorian, the hat of the country. The first one is the Dorian safari. The next one is the Dorian Western, and the third is the Dorian Farmer.

And on the reverse side it is the same advertisement but in the African's language, and this is similar to the local newspaper advertising that Dorian does.

Q You testified yesterday that Dorian Hats were the supplier from whom you purchased the hats which you -- the safari hats which you sell, is the safari hats?

A That is correct.

Q In this advertisement, the designation of this hat is the Dorian safari hat?

A That is correct.

Q Is that a designation made by you or by the manufacturer?

A By the manufacturer.

MR. WELS: Your Honor, I offer Exhibit GGG for identification in evidence.

MR. HOPGOOD: No objection.

(Defendant's Exhibit GGG received in evidence.)

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Q Now yesterday, Mr. Lee, when I showed you the safari shoes which you sell, you identified them as having been made by the Bata Company.

A That's correct.

Q I show you Defendant's Exhibit FFF for identification and I ask you if you can tell us what that is.

A This is a brochure produced by the Bata Shoe Company of East Africa, describing its safari boots, and the cover ofthe brochure says "Bata Safari Boots, the boots that say you know Africa."

The inner pages describe the shoes and show a map of East Africa with the location of the various African game animals shown superimposed on the map, and also shows some animals and birds that are likely to be encountered on a safari.

This brochure shows one of the motels that we had looked at yesterday.

Q This is a brochure published by the manufacturer from whom you purchase the shoes?

A That is correct.

Q Do you identify these shoes in your advertising catalog in the same manner as the manufacturer does?

A Well, we don't use the same copy. We call them Kenya -- that particular shoe we call Kenya safari

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boots, but they call them all safari boots. We do not sell each of those models. We only sell one of the models in that particular brochure.

Q They call this the Bata safari boot?

A That's right, yes.

MR. WELS: I offer Defendant's Exhibit FFF for identification in evidence.

MR. HOPGOOD: No objection.

(Defendant's Exhibit FFF was received in evidence.)

Q Mr. Lee, in your testimony yesterday you referred to the use of the word "Calahari" in referring to some of your clothes for safari. Could you tell us what the word calahari indicates and what it means?

A Yes, calahari is the name of the largest desert of Southern Africa, the Calahari Desert, which encompasses most of the Republic of Botswana and a part of South Africa.

Q Mr. Lee, I show you Exhibit CCC for identification, and I ask you if you can identify this as one of the safari garments whichyou merchandise?

A Yes.

Q Can you describe, tell us what this is?

A This is a bush jacket which is made in China. It

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is our lowest priced bush jacket. It is all cotton, and it is a fuller cut than our tailored bush jackets. It is a very good rough wear item.

MR. WELS: I offer Exhibit CCC for identification into evidence.

A That has a retail price of only $15.

MR. HOPGOOD: Would you care to state the relevance of this?

MR. WELS: We were going into the items which he sells, and we were showing, attempting to demonstrate that -- so that the Court would have fully before it -- the things that he sells in this line and the fact that they are not imitative or copied from the Abercrombie line.

MR. HOPGOOD: I can't object.

THE COURT: You have offered a somewhat similar shirt.

MR. WELS: Yes, sir.

THE COURT: That has been received in evidence. Any objection to this exhibit?

MR. HOPGOOD: No objection, your Honor.

THE COURT: Received in evidence.

(Defendant's Exhibit CCC was received in evidence.)

Q I show you Exhibit DDD for identification. Can

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you identify that for us?

A Yes, this is our very best safari jacket, made of 100 per cent cotton gabardine which is made in France to our own design.

Q What does that sell for?

A $145.

Q I show you Exhibit EEE for identification, and I ask you if you can identify that for us.

A Yes, this is our South African safari jacket made for us in South Africa of a 65 per cent polyester, 35 per cent rayon material that we call Calihari cloth.

Q What does that sell for, Mr. Lee?

A $55.

MR. WELS: I offer Exhibits DDD and EEE for identification in evidence, for the same purpose as Exhibit GGG.

MR. HOPGOOD: No objection.

THE COURT: The label is there? They are both labeled.

MR. HOPGOOD: The labels are the Hunting World elephant design.

THE COURT: Then he has the content described there as well. One is made of French, I suppose it is, Egyptian long fiber cotton.

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THE WITNESS: Yes.

THE COURT: The Cotton in Egypt, as I recall it, is of long fiber, somewhat comparable to the lon fiber of the Australian wool.

THE WITNESS: That is correct.

(Defendant's Exhibits DDD and EEE, respectively were received in evidence.)

Q Does Hunting World sell any clothing or other things for fishermen or anglers, Mr. Lee?

A Yes, we do.

Q Mr. Lee, on the motion for summary judgment, which is part of the Court record, you made an affidavit sworn to March 27, 1970, and among the exhibits attached to that affidavit were various articles and editorial usage of the word "safari." Do you recall that?

A Yes.

Q Have you collated those exhibits into a folder?

A Yes, I have.

Q Does Exhibit III for identification include those portions of the exhibit which were attached to that affidavit?

A Yes, it does.

MR. WELS: I offer Exhibit III for identification in evidence.

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MR. HOPGOOD: This includes a certain amount of duplication of stuff that you have already put on.

MR. WELS: I don't think it does because we haven't gone into the --

THE COURT: This is simply done as an aid to the Court.

MR. HOPGOOD: All right, I just thought I better note that I had understood some of this is repetitious.

THE COURT: Some of them are duplications.

MR. HOPGOOD: I have no objection to it, your Honor.

MR. WELS: May I say, your Honor, that in another binder which we are not putting in evidence there are the various advertisements that we are not putting in. This one doesn't duplicate those things that are in evidence.

THE COURT: Do you have any objection?

MR. HOPGOOD: No objection.

(Defendant's Exhibit III for identification was received in evidence.)

MR. WELS: I have no further questions of Mr. Lee, Mr. Hopgood. You may cross-examine.

THE WITNESS: Mr. Wels?

(Mr. Wels confers with witness.)

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MR. WELS: I am sorry, there is one that I had forgotten.

BY MR. WELLS:

Q I show you Exhibit HHH for identification, Mr. Lee, and I askyou if you can identify that for us.

A Yes, this is the spring 1973 catalog published by Jonas Bros., Klineburger, Jonas Bros. of Seattle of outdoor clothing and equipment.

Q Who are they?

A The Klineburger Bros. Jean, Burt, and Chris, are the owners of the Jonas Bros. of Seattle, which originally was a taxidermy firm, and some years ago they branched into sportswear and expedition and safari equipment, and they also arrange safaries and hunting and fishing expeditions in various parts of the world. They are very well known in the outdoor world, and they are an internationally known firm.

Q Does this catalog relate to or make reference to safaries and safari equipment?

A Yes, it does.

Q Would you indicate the page you are referring to?

A On Page 11 we have a range of their safari clothes, men's safari in quote "S" bush coats. Men's safari S bush coat again. Ladies' safari "S" bush coat.

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Men's safari slacks,"S." Ladies' safari slack "S." Then safari poplin long sleeve shirt, safari poplin short sleeve shirt. Men's corduroy safari coat.

Q Are there other pages at which there are similar safari references?

A Yes, Page 12, men's twill safari coat, ladies' twill safari shorts, men's safari twill shorts.

THE COURT: Aren't we getting a little far afield here?

MR. WELS: Well, your Honor --

THE COURT: We are all more or less familiar with this. These are materials and clothing worn on expeditions into the Olympic Peninsula of Western Washington. Mr. Justice Douglas has written about this in a number of his books.

MR. WELS: I would like to offer this for the same purpose as the other advertisements that were put in through Mr. Geis' testimony.

THE COURT: For that purpose I will take it.

MR. HOPGOOD: Your Honor, I would like to make an observation about this, but I will wait until the summation at the end.

THE COURT: If you want to make it now, you might as well make it now.

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MR. HOPGOOD: Well, I don't understand there to be any suggestion that we had this called to our attention and failed to object. We certainly would say that some of these uses in here are uses to which we probably would object. It represents an illegal use by third parties, and we say that the law supports our position that the third-party legal uses of a mark should not avail an illegal using defendant. Admiral against Penco.

xxx (Defendant's Exhibit HHH for identification was received in evidence.)

THE COURT: I will take it for what it is worth. I don't see that it has much relevance, but I will take it. I am taking it on this theory, that the word "safari" is sometimes used entirely in its descriptive way and not as a mark.

MR. HOPGOOD: Your Honor, the reason I made my observation is that I had never seen this before, but they have taken the trouble to put quotes on the word "safari" thus enhancing our emphasizing it in a way that we would consider objectionable, and I intend to at first opportunity do something about it.

THE COURT: Maybe you don't have to. All right.

MR. WELS: I have no further questions, your

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Honor. Mr. Hopgood?

CROSS-EXAMINATION

BY MR. HOPGOOD:

Q Mr.Lee, I would like to ask you a few questions about your book which I see the Judge has with him.

A Yes, here take it (handing).

THE COURT: I was just looking at it.

Q How many copies of that book were printed?

A I believe the printing run was 5000 copies.

Q Was it reprinted?

A No, it was not, but I am at present rewriting it.

Q I would like to have you turn to Page 155. There is a photograph on the bottom of the page of a man with a gun standing beside some animal, some poor animal he just short.

A Yes, I see it.

THE COURT: What poor animal? What do you mean?

THE WITNESS: It was a warthog.

THE COURT: A what?

THE WITNESS: A warthog.

Q Is that on a safari? Is that what that is supposed to be, somebody who shot this animal on a safari?

A Yes,that is Mr. Fritz Goetz, a famous sports fisherman.

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Q I wish you would look at his hat.

A Yes, he happens to be wearing a sport fishing hat.

Q But does itlook like the hat for your safari that you say is the hat, the hat for safari?

A No.

Q Exhibit XX.

A It doesn't look anything like that because Mr. Goetz is a very unconventional man.

Q Does it look like the other hat for safari that you advertise "Our Minisafari T.M."

A It does not.

Q Exhibit --

A It does not look like that hat, Mr. Hopgood.

Q That is Exhibit 48. Does it look like any of these that Abercrombie & Fitch sell and which were married with the trademark Safari inside?

A Well, it could be somewhat resembling the one in your left hand. That is a fishing cap or a golfing cap.

Q It is more like Exhibit 13 than any other marked hat?

A Yes.

Q In this book, you have a check list at the end, don't you, of the kind of clothing to take along on a

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safari?

A Yes.

Q Bottom of Page 221, running over to top of Page 222, is that right?

A Right.

Q I may have missed it, but the only provision there for a hat is the last entry.

A That's right, one Stetson hat, three and a half in brim, medium tan color, which was the nearest thing to this type of hat available in this country.

Q It does say one Stetson hat, doesn't it?

A Yes.

Q What is meant by a Stetson hat?

A A large brim western hat which is very similar in shape to the typical safari hat except the brim on the western hat is usually rolled up and on the safari hat it is tilted down front and rear.

THE COURT: It was an American hat manufacturer, John B.Stetson & Company.

THE WITNESS: Right.

THE COURT: Originally I think their factory was around Pennsylvania, Philadelphia, was it not?

THE WITNESS: Yes, I think it was.

THE COURT: But they did develop a hat which was

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known as the Texan hat.

THE WITNESS: Yes.

THE COURT: Sold principally or largely down in the southwest.

THE WITNESS: Yes, a typical broad-brimmed western hat.

THE COURT: So John B. Stetson, Stetson refers to a big hat?

THE WITNESS: Big brim safari.

THE COURT: One of the hats manufactured by John B. Stetson Company.

THE WITNESS: Yes, your Honor.

THE COURT: And when we refer to a Texan hat, a Stetson or Texan, it is like a big cowboy hat?

THE WITNESS: That is correct. That was the closest type of hat to this type available at the time this was written in America.

THE COURT: They used to get a good price for them years ago, $40, $50 out in Topeka.

THE WITNESS: Oh, sure.

Q You capitalize S in writing Stetson, don't you?

A Oh, yes, it is the name of a manufacturer.

THE COURT: It is a name, last name.

Q That is in contrast to the other entries for

clothing, --

A I use the trade name Vaella, with a capital V.

Q That is somebody's name?

A And Russell with a capital R, Russell bird shooter which is theRussell designation of that particular type of shoot. It is a capital B on Birdshooter. And Captial W on Wellingtan.

Q You say with regard to the hats that you are supposed to go around and make sure that it is at least 3-1/2 inches on the brim, don't you?

A Approximately.

Q What do you make of it with my ruler on your hat?

A That is about more or less three, three and a -- three inches.

Q Three inches?

A Yes.

Q It varies, doesn't it?

A Varies a little.

Q Three, 3-1/4?

A Yes.

Q That is on your Exhibit XX?

A Yes.

Q But on your Minisafari which is Exhibit 48, it is nowhere near that, is it?

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A No, but that is not the hat I would specifically recommend for safari uses. That is the citified version of the safari hat which was contrived really as a sport hat.

THE COURT: It is worn on safari going up and down Fifth Avenue.

THE WITNESS: Sure.

THE COURT: All right. By those who are wearing it.

THE WITNESS: Yes.

THE COURT: And can afford to buy them?

THE WITNESS: Yes, your Honor.

Q Now, Mr. Lee, in your book you acknowledge Abercrombie & Fitch is the source of highly satisfactory clothing, don't you?

A I do, but I also mention that the color was too light, and as a matter of fact in those years I used to plead with the people in the clothing department to order their clothes from a little darker color.

Q What do you mean by clothes?

A The cloth that Abercrombie refers to as its safari cloth.

Q And you in your book refer to it as "safari" -- "safari cloth," don't you?

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A Yes.

Q Page 77.

A Yes. I pointed that out to you myself.

Q Do you have anywhere else in that book where, in the body of text -- I am not talking about a starting sentence where you have to capitalize the first letter -- is there anywhere else in the body of the text of that book where it is capitalized on Safari other than where you are referring to it as Abercrombie & Fitch's product?

A I couldn't -- certainly couldn't recall, Mr. Hopgood. I would have to examine the book.

I tell you I read it last night specifically looking for it and couldn't find it.

Q Thank you.

A Incidentally, in this check list you mention it.

Q I didn't ask you any more.

THE COURT: Let him finish. Be nice to him.

MR. HOPGOOD: I am sorry.

THE COURT: Finish your statement.

MR. HOPGOOD: All right, very sorry.

THE COURT: When you make a statement you shouldn't have made, so let him keep it up. Go ahead.

A On the same page that you refer to, Mr. Hopgood, Page 77, there are in quotes on safari clothing

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where we mention one felt hat, western style, with three-inch or wider brim; just wanted to give that.

Q All right. But you intend thereby to describe what you call a hat for safari, don't you?

A Yes, but Mr. Hopgood, this was written in 1959, when the availability of this particular hat in America was nil. It wasn't available before.

Q But it was a hat for safari you were describing, wasn't it?

A Yes, a western hat.

Q A hat specifically for safari, you were making the recommendation?

A That's right.

Q And you were able to describe it without using the word "safari," weren't you?

A I was.

Q The same is true with your tabulation at the end where you talk about the Stetson hat, isn't it?

A Yes, because there wasno safari hat available in this country, Mr. Hopgood, at that time. So we had to make do with available substitutes.

Q The answer is yes. Were you able to describe the hat?

THE COURT: Please don't do that. You have

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me at a disadvantage today. I can't talk with my laryngitis.

Next question, please.

Q Just to make it clear --

THE COURT: No, we have got it clear. Next question, please. It is perfectly clear.

MR. HOPGOOD: All right.

Q I don't know where I have seen these, but I know you will agree with me that your advertisements of clothing in your Calihari line give prominent display of the word "Calihari" with T.M. alongside, doesn't it?

A Yes.

Q Have you obtained a registration for Calihari as a trademark?

A Yes, we have.

Q Did the Patent Office make any objection that that was a geographic term?

A I don't recall,sir.

Q Did you tell the Patent Office that this was a geographic term?

A I don't recall. I didn't make the application out. I signed it, but I don't recall the contents of the application, sir.

Q It is a geographic term, isn't it?

A It is a geographic term.

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Q Now I show you Exhibit GGG which your attorney had you identify as the catalog sheet of Dorian Bros., or Dorian, rather, for their hats.

A Yes, sir.

Q And I don't know if I heard it correctly, but were you telling the Court that [redacted]e hats there depicted are safari hats?

A No, sir. Only one of them.

Q I thought I heard you say they were safari hats.

A No, Dorian, the hat of the country, and I specifically stated that from left to right they are the Dorian safari, the Dorian western, and the Dorian farmer.

Under the general headline "Dorian, the hats of the country."

Q Is one of those like the Stetson?

A May I see it?

THE COURT: What are you showing him. You have to put on the record what you are showing him. One of what look like the Stetson.

MR. HOPGOOD: Talking about Exhibit GGG.

A The nearest of these to the Stetson that I always used to wear before this hat was available to me is in fact the Dorian safari. The only difference being, if you show me the hat, I will show you.

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(Hat handed to witness.)

Q Exhibit XX.

A The difference is on the Stetson the brim is shaped about like that with the front tilted down a bit.

THE COURT: Indicating the sides bent and rolled over.

THE WITNESS: Right. And I used to pull the brims on my Stetsons down in this shape as many people did.

Q As I remember when we examined you before trial, you said you intended to file applications to register Minisafari and Safariland. You did in fact file such applications?

A Mr. Hopgood, my memory is not clear on that, and specifically while going uptown in the cab yesterday, I asked Mr.Wels and Mr. Offner about it and Mr. Offner's recollection was that we had filed an application, although I didn't file it, that we filed an application on Minisafari, but we don't know whatever happened to it, whether it just lapsed or we were supposed to do something to follow it up and didn't, I don't really have any specific recollection on that.

Q We had asked to be supplied with this as part of the pretrial discovery and we were never supplied with it.

THE COURT: He doesn't know what you are talking about now except if he looks at the bill from his lawyers.

MR. HOPGOOD: I will see that at Page 93 of the Lee deposition, which is part of what we have indicated as what we are relying upon is this statement to which you refer where he said he intended to file.

Q I am not sure if I recall correctly what your testimony on the point was, but maybe you can tell us, did you ever do your own trademark searching as to availability of marks?

A My own personally?

Q Yes.

A No.

Q Did you consult an attorney?

A Yes.

Q From the very beginning?

A Yes.

Q Did you conduct searches or have searches conducted before filing an application?

A Well, I presume that my attorney did that.

Q You don't know?

A No. I think as a matter of course the attorney would do that. Excuse me, I may have, when I first started in this business, filled out an application for a

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mark myself, but I don't remember. I think I then gave it to an attorney, it got too complicated.

Q Do you remember this part of your book where we were talking about your recommendation as to Abercrombie & Fitch, and this is as of the time you were writing the book which I take it is about 1960.

A Yes.

Q Had you familiarity with the products marked "Safari" of Abercrombie & Fitch at the time?

A Had I familiarity?

Q Yes.

A Yes. I purchased them.

Q These were the kinds of clothes Mr. Geis testified about and which we marked as exhibits?

A The bush jacket, and I don't know if I saw the slacks, but the bush jacket was the type of jacket -- garment that I referred to here, but not the hats or the shoes.

Q Had you been over to Abercrombie & Fitch to deal with them in connection with these clothes?

A Yes.

Q Had you had occasion to see the label?

A Yes.

Q And the label, did you find the mark "Safari"

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on the label?

A I am sure I did. I don't recall, but I don't dispute that it was there.

Q And this was all at least as of the time you wrote the book?

A Yes.

Q In fact, you had known of Abercrombie & Fitch since a very early age, hadn't you?

A Yes, I have.

Q And you had a charge account there from what, age 17?

A About.

Q Had you received catalogs from Abercrombie & Fitch because you were on the charge account?

A Certainly.

Q Had you had occasion to look through them and note that safari appeared as a trademark against some of these items of clothing?

A Mr. Hopgood, I believe you are referring to the years during which I was in the safari business and prior to the time this book was written.

Q That's right.

A Yes, the answer is yes, I received the catalog, yes, I did see the safari clothes, but no, I did not

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necessarily in those days associate the word "safari" as a mark of Abercrombie & Fitch Company but rather as a descriptive -- as a word being descriptive of the merchandise.

Q Were you that sharp at the time to know the difference between a trademark and a descriptive use?

A No, that is why I would say that I considered it being descriptive of the article. It was perfectly normal to all a safari jacket a safari jacket.

Q Before adopting the mark Minisafari or using it with the symbol T.M., did you consult an attorney to determine whether there were any prior marks that you might be infringing?

A I don't recall.

Q In your direct testimony you spoke of shoes, and I don't remember whether you referred to the term Chukka in that connection. Is Chukka a good descriptive term? Does it mean something to you?

A Chukka means an ankle height boot to me. It is derived from an Indian word with respect to polo, the game of polo -- I am sorry, a kind of name for an ankle height boot, it can be a laced boot or buckled boot, but it means that height of boot to me.

Q The boots that were in that catalog that you

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had from Bata Shoe, are those Chukkas? This is Exhibit FF (handing).

A Yes, I would consider all of these boots to be Chukkas.

Q And something was said in your testimony about one of these was the one you show in your catalog. Can you tell us which one that is?

A Yes. It is their Design 24, but we get it in a different color.

Q The bottom left corner of the open full-page spread?

A Yes, we also sell other shoes made by Bata but they are not in that circular. They are in another one of their safari brochures.

Q Are they ankle height also?

A One is just a little above the ankle.

Q But you still call it a Chukka?

A Yes.

Q More or less ankle height?

A Yes.

Q As a matter of fact, in your book when you are telling people what to equip themselves with, -- I don't remember where I saw it -- but there is reference to the -- be recommended that there be an ankle high boot.

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A Yes.

Q As part of the equipment, isn't there?

A Yes, sir.

Q Do you call that a Chukka in the book?

A In one, on Page 76, I call it one pair crepe soled desert shoes, ankle height. Which is another acceptable name for those shoes, but I stay away from calling it a desert shoe now-a-days because Clark's of England have registered the name "desert."

Q Is it registered in this country, if you know?

A I see it with an "R" appearing in the ads for Clark's desert boots, so I guess it is.

Q Can it be called a Chukka?

A Can it be called a Chukka?

Q Yes.

A Yes.

Q Does anybody have "Chukka" registered, to your knowledge?

A Not to my knowledge.

Q In the book do you call it a safari shoe?

A I call it a desert shoe.

Q As such it is very descriptive or adequately descriptive, isn't it?

A I think -- I would say it is more adequately

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descriptive to someone really familiar with it. I say the average person in the street doesn't know what a desert shoe is, but a person seriously contemplating a safari might be more than inclined to know what it is. I think that my knowledge, my technical knowledge of sportswear in general and sportswear terminology in general was not as good then as it may be now.

Q Speaking of shoes though, it seems to me, and again I apologize, I don't know where I have seen it, but you can confirm for me,whether you yourself have entered into the design aspect of shoes?

A Yes, I have.

Q Has this been in connection with Chukkas at all?

A Yes.

Q Pleasetell us which ones you have designed.

A I have either designed or redesigned a number of them. The elephant leather Chukkas, which are shown in our catalogs, are my own design with the exception of the one made by Johnston & Murphy, which was adapted from a Johnston & Murphy design and changed.

The four eyelet high veldt shoe that we don't have in the current catalog, but we have sold for a number of years was my redesign of one of the Bata safari shoes

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just making it higher.

Q Still more or less ankle height, isn't it?

A A little over the ankle.

Q Is the veldt shoe -- does the veldt shoe meet the same description?

A Yes. Well, the high veldt is just a higher version of the veldt shoe. It is about a half inch higher. It has four eyelets instead of two.

Q They are all Chukkas though, aren't they?

A They all can be described as a type or variation of a Chukka or ankle high boot. Some suitable for street wear, some suitable for cold weather wear and some suitable for tropical wear.

Q Overnight I had my first look at some of your earlier catalogs. I would like to have them marked as exhibits. These are I am told the only ones. Maybe you better identify them for me. This one says 1966.

A That is the only one.

Q This one says 1966-67, and this one says '68.

A Yes, sir.

MR. HOPGOOD: I would like to have these marked, please, and received in evidence if there is no objection, Mr.Wels.

MR. WELS: '66?

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MR. HOPGOOD: The three which I just had the witness identify.

THE COURT: Plaintiff's Exhibits 73, 74 and 75.

cxx (Plaintiff's Exhibits 73, 74 and 75, respectively, were marked for identification.)

Q Before breaking Mr. Lee, we were talking about certain items of Bata shoe, and I have a document furnished to us after your examination relating to Bata, East Africa, Bata Shoe Company, Ltd. Can you tell me whether that covers items purchased by your company?

A Yes, it does.

Q Are these items which show up in your catalog?

A Yes, they do.

Q How are they described in the catalog or can you refer us to the catalog that would show such items? Was it in your '74 catalog, for example, that we find those?

A One of these items is in the '74 catalog.

Q Would you please identify it for us (handing to witness).

A Page 18, Kenya safari boots.

Q My note indicates that that is a boot that was marked as a physical exhibit YY.

A Yes.

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Q How did the Bata Shoe Company describe this shoe?

A They describe it as Article 8-32029 (hunting calf boot cashmere," that is the end of their description, sir.

Now, hunting calf is their designation for the type of upper leather used in this boot. It is the brown --

Q Is that one of the shoes shown on the Bata circular?

A Yes, that is this one.

Q Design No. 24, right?

A Yes. A rugged safari boot as they describe it.

Q Don't they also say in their description that it is a men's leather shoe with natural crepe soles?

A Yes, they do. That is a commercial invoice that goes to Customs; and Customs has certain types of designations that it prefers on import items.

Q Did you order these boots by that five digit code 32029?

A No, we never use their code numbers. We use our own description. Their code numbers are very confusing.

Q I see. There is another one here called a hippo boot. Is that one of those that you have also advertised in your catalog?

A In the old catalogs.

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Q Is that the one that you call hippo safari?

A That's right.

MR. HOPGOOD: I would like to have this invoice which has been identified by the witness marked as the next exhibit number, please, and received.

MR. WELS: May I see it?

MR. HOPGOOD: Sure (handing).

MR. WELS: No objection.

(Plaintiff's Exhibit 76 was received in evidence.)

Q Mr. Lee, we have had marked for identification three of your catalogs which we just briefly identified before breaking, namely, the 1966 one, which is marked Exhibit 73; the 1966-67 one which is marked for identification Exhibit 74; and the 1968 one which is marked for identification Exhibit 75.

To your knowledge are these the three that precede the 1969 catalog?

A Yes, but I am not quite sure, but I think we published another catalog in '68. I am not positive of it.

Q Some were in between?

A Yes, I am not sure.

Q This first one, is this the first catalog you ever published in the name of Hunting World? That is

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Exhibit 73.

A I believe that we had one -- I know that we had one prior to this which in fact I think was either 16 pages or it was this identical catalog, but it said "Winter '65" on it, but I haven't been able to find a copy myself. I remember that we did print a small run at the very tail end of '65 and it was basically that. It may have been a little bit smaller.

MR. HOPGOOD: Before I forget it, I would like to have the exhibits marked 73, 74, and 75 for identification received in evidence.

MR. WELS: No objection.

(Plaintiff's Exhibits 73, 74 and 75, respectively were received in evidence.)

Q This first catalog, Exhibit 73, and its succeeding one, would you call those 20-page catalogs?

A Well, this is a 20-page catalog.

Q You don't remember the other one as any different, do you?

A It was either 16 or 20, I am not sure.

Q Does this catalog advertise clothing?

A No, this catalog does not.

Q Does it advertise hats?

A No hats.

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Q Does it advertise shoes?

A No shoes.

Q Does it make any reference to safari country?

A A quick glance does not seem to show any reference to safari country, but the word safari is used in a number of places.

Q But my question is specific --

A I don't see it, sir.

Q -- the the expression safari country.

A I don't see it.

Q As a matter of fact, do you have any recollection of when you first began to use the expression safari country in connection with shoes or hats or clothing?

A I would guess that it was probably about '67.

Q Would you go by the catalogs?

A Well, in many instances, Mr. Hopgood, we have merchandise that does not appear in our catalog. For instance, right now we probably have four or five thousand different items that are not in our catalog, and even in the early years we had many items that were not in the catalog, so the mere fact that an item does or does not appear in the catalog does not necessarily mean we did not have the item available for sale or sell it.

Q I don't know if I was understood. My question

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had to do with the expression "safari country" and your use of that expression. Let's limit it to either putting the expression on the article of clothing or shoe or what have you, or anything else and putting the thing in a catalog or other advertising.

A I'd say either in a hang tag or catalog or other advertising we probably started using it in '67.

Q I will ask if you find it in the catalog for 1966-67.

A Again a quick glance does not show it to me. I don't see it.

Q Do you find it in the catalog for 1968, Exhibit 75?

A I don't see the words "safari country" here.

Q That was as to the catalog for 1968, wasn't it?

A Right.

Q '68?

A '68.

Q Now I will ask you the same question as to the catalog for 1969. Do you find the expression "safari country" in that catalog?

A I do not find the words "safari country" I find the words "safari shoes from Safariland," in this catalog.

Q What does the expression -- you have used

the expression "Safari Country," haven't you?

A Yes.

Q High safari shoes from Safari Country?

A Yes.

Q Safari hats from Safari Country?

A Yes.

Q Safari clothes from Safari Country?

A Yes.

Q Have you used it in other ways?

A I believe those are the ways I used it.

Q As far as these catalogs that you have considered are concerned, all such uses of Safari Country have been since you were first notified by the plaintiff of an alleged infringement. That is true, isn't it?

A As far as these catalogs are concerned?

Q Yes.

A I am very rusty on dates. If you say it is true, I will agree to it. I don't remember.

Q I am trying to let you know each time --

A When was the first?

Q I will let you know that the complaint, the first writtten complaint was in the early part of 1969. Then the term safari clothes from Safari Country did not appear in these catalogs prior to the complaint. In fact,

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the expression "Safari Country, didn't appear prior to the first notification, did it?

A Did not appear in these catalogs. It may have appeared in other --

Q Did it appear in any catalogs that you know of?

A In any catalog that I know of? I would say it did not.

Q You did mention Safariland and that reminds me of something about your book. In the table of contents there is a chapter which uses that expression, isn't there?

A There is.

Q What chapter is that?

A Chapter 15, entitled Portuguese Africa, the new safariland."

Q What does safariland mean?

A It means safari country. It means to me -- it means an area in Africa rich in wild life.

Q You are saying it is equivalent to safari country, is that right?

A Yes.

Q It doesn't mean, does it mean any particular country when you use the word "country"?

A No, I use the word country in Africa refers to safari country in Africa, meaning any area, any

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country that is good for safari. Safari country could be Kenya, safari country could be South Africa, safari country could be Angola, safari country could be Mozambique, any country in which there is good opportunity for safari.

Q Do you know of any use in your book of the expression safari country?

A Sorry, I wrote the book 14 years or so ago. I don't remember every word. I did use the word safariland.

Q Yes, we just drew attention to that.

A And I would be almost certain that if I went through this book, I probably used -- I would think I used the word safari country somewhere in the text of it. I am not prepared to make a definitive statement now without reviewing the book.

Q At least as to safariland, at least includes this Portuguese Africa, the new area that you mention in that chapter?

A I call it the new safarilands, not the only safari-land.

Q What else is meant by safarilands?

A The old safarilands were really Kenya and Tanganyika, all British East Africa, Kenya, Tanganyika, Uganda, East Africa. Portuguese Africa was the new safariland. We were the first people to set up large-scale safari

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organizations there.

Q You have used the express safariland as a trademark, you put the letters T.M. on the side of it.

A Yes.

Q What is that supposed to mean?

A It means that I consider the mark ours with respect to a retail store or a department in a retail store.

Q From which clothing, including hats and shoes, is sold?

A Yes.

Q And in connection with which your clothing and hats and shoes are also advertised?

A We have not been using the word safariland in recent advertisements, but we still use it in the catalog, not necessary on the same page, about the clothing articles.

Q But you have used it in your advertisements?

A Yes, we have, sir.

Q And those advertisements have appeared since you were first notified of a claim by Abercrombie & Fitch?

A I cannot say yes or no, but I wouldn't doubt it.

Q In the 1966-67 catalog, which is Exhibit 74, you have at Pages 42 and 43 a spread of Calahari clothing, haven't you?

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A Yes.

Q And you are prominently identifying that with the TM throughout, aren't you?

A Yes.

Q Now the various items which are shown are a bush jacket, right?

A Yes.

Q And shorts?

A Correct.

Q And culottes?

A Correct.

Q And a bush shirt?

A Yes.

Q And a topee?

A Yes.

Q Personally I don't know -- what is a topee?

A That is the old-fashioned pith helmet.

Q Topee, is that a word?

A I believe the word Topee originated in India. I think it was one of the Indian names.

Q Those words were sufficiently descriptive, weren't they, of the items?

A They were sufficiently descriptive.

Q The previous page, which is Page 4 of the

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Exhibit 74, shows two hats or is it one hat in just two shapes, called the Calahari hunter?

A That is correct.

Q Is that a safari hat?

A It really is not a very authentic one because it was made in this country, but it was the best that we could get at the time.

THE COURT: Which one is that? The top one?

MR. HOPGOOD: Both of them .

THE COURT: The top one looks more like we used to call those, the Australian hats.

THE WITNESS: Yes, it is very similar to it.

Q In fact it says really two hats in one, your Honor. Calahari Hunter may be worn Aussie style, and so forth, or white hunter style.

A But that is not the Dorian hat. That was a hat made in the States by Byer Rolnick Company down in Texas as an imitation of the safari hat. It was the best we could get at the time.

Q But you put your trademark on it, didn't you, Calahari?

A Yes, we did.

Q And it meets the description given in your book for what a person should take along for a safari journey

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in Africa?

A It was an adequate hat.

Q It meets that description, doesn't it?

A Yes.

Q With a wide enough brim and so forth?

A Yes, sir.

Q At the end of your book where you are recommending what a person should take along for his safari in Africa, you have two listings, don't you, one for an expedition that goes by air and another one which goes by presumably sea and land.

A Yes, sir.

Q And when you told people to take along a Stetson hat and with the 3-1/2 inch brim, you were directing their attention to the heavier one of those, that is, the sea and land approach, weren't you?

A Yes.

Q So that for the air, did you recommend a hat?

A I recommended "all other clothing to be purchased in Nairobi," of course including a hat because you go back into the section onoutfitting, I certainly recommended they should have -- on Page 77, one felt hat western style with three-inch or wider brim.

Q Thank you. From your great experience with

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safaris and organizing and recommending them and so forth, what is the practice today? How do people get to these expeditions? Do they go primarily by air or by sea or what?

THE COURT: Objection sustained. I think we have gone over this enough and enough. What difference whether they go by jet or they go by some machine that breaks the sound barrier or not? I am not concerned with that.

MR. HOPGOOD: May I merely say what I was driving at, your Honor?

THE COURT: You may. All right.

MR. HOPGOOD: I was trying to find out what the proportion of sales from the Hunting World shop here in New York is today for going tothe country club status seeking New Yorker type person, or for an expedition.

THE COURT: I am not concerned with that. I am not concerned with whether somebody buys this material because of its so-called snob appeal or whether they buy it for a utilitarian purpose, whether he wants to go to be dressed up in some outfit that nobody else but the exclusive bon vivant and the well-heeled, well-supplied individual wants, an actor or someb ody of that type. I am not concerned.

THE WITNESS: John Wayne has a whole --

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THE COURT: I don't know who John Wayne is from a hole in the head. All I know is we had a great colonial government in James Duane years ago. Duane Street down here is named after him.

MR. HOPGOOD: I have no further questions.

THE COURT: All right. I am not speaking disparagingly of you or Abercrombie & Fitch as being business men. There are certain demands which are very profitable in the market and you go after it.

THE WITNESS: Thank you, your Honor.

THE COURT: That is business.

Some people want to pay $180,000 for a car. Others claim they can get just as good pleasure out of a $2000 car.

REDIRECT EXAMINATION

BY MR. WELS:

Q Mr. Lee, Mr. Hopgood on cross-examination showed you a photograph of Fritz Goetz wearing a fishing hat on safari. Is there in that book another photograph of him wearing another type of safari hat?

A Yes, on Page 28 he is wearing a broad-brimmed hat of the type I recommend.

Q Mr. Hopgood asked you about the use of the term "from safari country."

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A Yes, he did.

Q I show you Exhibit KKK for identification, which says safari shoes from safari country, and I call your attention to this particular item that says at the bottom "Copyright 1969 Hunting World, New York, " and I ask you if that refreshes your recollection as to when you might have first used that mark?

A I don't remember whether this was the first time I used it, but this particular item is a hang tag that was furnished with the safari shoes that we imported from South Africa, not from Bata, but from another manufacturer in South Africa, and these were called original veldt boots, safari shoes from safari country, made in South Africa by Africa's finest bootmakers.

THE COURT: We had this.

MR. WELS: Your Honor, I want to bring this in because Mr. Hopgood raised the question of the year.

THE COURT: We had enough of this about these veldt shoes.

MR. WELS: I think we have, but it just is that a question was raised as to the date, so I offer Exhibit KKK for identification in evidence.

MR. HOPGOOD: No objection.

(Defendants' Exhibit KKK was received in evidence.)

XXX

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Q Mr. Hopgood asked you on cross-examination, Mr. Lee, about Stetson hats. Have you ever known Stetson to use the term "safari" in its catalogs or advertisements advertising its hats?

A Yes.

Q I show you Exhibit LLL for identification, and I ask you if that is such an advertisement of a Stetson hat called a safari Stalker by Stetson?

A Yes, it is.

MR. WELS: I offer Exhibit LLL for identification in evidence.

MR. HOPGOOD: Can you enlighten the Court as to what year this is?

MR. WELS: I am unable to ascertain the year.

MR. HOPGOOD: It has been clipped from Page 54 of some catalog and I don't even know if it is a Stetson one.

MR. WELS: It is a Stetson one.

MR. HOPGOOD: On your representation, no objection.

MR. WELS: I offer Exhibit LLL. There is no objection.

(Defendant's Exhibit LLL was received in evidence.)

Q Mr. Lee, have you ever known of anyone else

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making use of the term Minisafari in its advertising?

A Yes.

Q I show you Exhibit MMM for identification and I ask you if that is an example of such use?

A Yes, it is. It is an advertisement for Scandinavian Airlines, their tour department, and it describes the SAS "Minisafari" tours.

MR. WELS: I offer Defendant's Exhibit MMM for identification in evidence.

MR. HOPGOOD: I object to this, your Honor. A tour is quite irrelevant to what we are talking about in this lawsuit.

THE COURT: It is about time we stopped this, objection sustained.

Q Now, Mr. Lee, Mr. Hopgood was asking you about many invoices on cross-examination. I show you Exhibit NNN for identification and I ask you if you can identify that for us.

A It is an invoice for Dorian Minisafari hats.

Q Who was that addressed to?

A Hunting World.

Q Who does that come from, Dorian Hats of South Africa?

A From Dorian Hats of South Africa on 3/9/1969.

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MR. WELS: I offer Exhibit NNN for identification in evidence.

MR. HOPGOOD: Did you describe this as one invoice or two?

(Mr. Wels and Mr. Hopgood confer.)

MR. HOPGOOD: You are representing to the Court this date is 3/9/69? The European system of dating I know as the exhibit refers, and that would be the third of September 1969, if I understand that they follow the European system.

MR. WELS: I will have to ask Mr. Lee who is more familiar than myself.

THE WITNESS: It varies from country to country or also office to office or factory to factory. I couldn't ascertain from the invoice. I dan't definitively say whether it is March or September.

MR. WELS: But it was 1969.

MR. HOPGOOD: It might help if --

THE WITNESS: Wait a minute. There is a rubber stamp at the bottom that says September '69.

MR. HOPGOOD: No objection.

(Defendant Exhibit NNN was received in evidence.)

Q I showyou here Defendant's Exhibit OOO for identi-

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fication, which appears to be invoices from Sterling Clothing manufacturers in Johannesburg to Lee Expeditions, Ltd., on one May 25, 1966, and May -- the other May 12, 1966, and I ask you if you can tell us what those were for.

A Ladies' safari jackets. Another safari jacket apparently a sample.

MR. WELS: I offer Defendant's Exhibit OOO for identification in evidence.

MR. HOPGOOD: No objection.

xxx (Defendant's Exhibit OOO for identification was received in evidence.)

Q I show you Defendant's Exhibit QQQ for identification which apparently is a Pan American Clipper cargo waybill which bears the date 26 May 1966, and I ask you if you can tell us what that is.

A Ladies' safari jackets.

Q That was from --

A Sterling Clothing in Johannesburg.

MR. WELS: I offer Defendant's Exhibit QQQ for identification in evidence.

MR. HOPGOOD: No objection.

xx (Defendant's Exhibit QQQ was received in evidence.)

MR. WELS: I have no further questions of Mr.

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Lee, your Honor.

THE COURT: Are we thourhg with Mr. Lee?

MR. HOPGOOD: I have a couple more questions, your Honor.

RECROSS-EXAMINATION

BY MR. HOPGOOD:

Q Mr. Lee, I just have a few question s. With regard to Exhibit KKK which is your hang tag Bata shoes.

A That is the sme one we had before?

Q All right?

A Yes.

Q Could you tell the Court, please, whether those shoes could be properly described as Chukka?

A Mr. Hopgood, I believe I previously testified that almost any ankle height boot or shoe.

THE COURT: You did.

A -- could be describee as a Chukka.

THE COURT: He has already answered. Please, please, we have had enough. He has already told us this. Told it to us yesterday and today before too, I think.

MR. HOPGOOD: I only wanted it pinned down to what this one was about.

THE WITNESS: He has pinned it down.

MR. HOPGOOD: All right, thank you.

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THE COURT: He said they all can be called Chukka if you want to call them Chukka, if they were ankle height boots.

Q Now on Exhibit LLL, we only have had a part of a page of ads, but it has three hats and the circle has been put around the one called the Safari Stalker. Does that hat from its appearance or description there more nearly resemble your Minisafari, which is Exhibit 48, or your big safari, which is Exhibit XX?

A It more nearly resembles the Minisafari.

Q As to the other two hats, do they more nearly resemble the Minisafari -- that is the other two in that exhibit OOO -- more nearly resemble the Minisafari which is Exhibit 48 or the larger one which is the Exhibit XX?

A They more nearly resemble the larger one, but the brim shapes are different on these Stetsons.

Q On those Stetsons those two other Stetsons, they call them White Hunter and Yearling?

A Yearling.

Q Do they appear to have a broad enough brim to meet the suggestion and recommendations you made in your book?

A Yes, they do.

Q With regard to Exhibit NNN, which is the invoice

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-- or I have now forgotten what you called it -- is it a shipping memo or an invoice for Dorian hats?

A It is a packing list.

Q A packing list, all right. It covered the Minisafari, didn't it?

A Yes, it did.

Q Do you happen to know, is this the first one that you obtained from them? Is that the beginning of your acquisition of Minisafari hats?

A I believe we had shipments of Minisafaris at the end of '68 or beginning of '69 but I am not sure.

Q What is the date of that?

A This invoice?

Q Yes.

A September 3, 1969.

Q To help you refresh your recollection, I will show you a document which had been furnished to us as part of the requested production in this case. It is a letter from Dorian Hats, September 9, 1969, to you. It does refer to Minisafari hats. Will that one help you recall whether the Exhibit NNN relates to the same order or is the first order or the first shipment for the Minisafari hats?

A This letter definitely refers to this shipping order, whether or not it was the first shipment, I don't

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know. Let me read this letter. It may give me a clue.

MR. WELS: May I ask that this letter be made a part of the defendant's exhibits.

THE COURT: No, we are going to take a recess. Two o'clock.

(Luncheon recess.)

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AFTERNOON SESSION
2:00 P.M.

R O B E R T M . L E E resumed.

MR. HOPGOOD: Since the break, your Honor, opposing counsel and I have talked about two pieces of paper which we have agreed can be received in evidence as Exhibit 77 and 78, respectively. They have to do with first dates of use by the defendant as to certain of the uses in this case.

Exhibit 77 is a letter of June 3, 1970, from Mr. Lee to Mr. Wolf of the New York Times.

RECROSS-EXAMINATION (continued)

BY MR. HOPGOOD:

Q Do you recognize that as your letter, Mr. Lee?

A Yes, I do.

Q And the other is a letter to Mr. Lee, September 9, 1969, from the Dorian Hat Company in South Africa.

THE COURT: And it is stipulated by both sides?

MR. WELS: No objection, your Honor.

THE COURT: Is itstipulated by both sides?

MR. HOPGOOD: It is.

THE COURT: That the dates set forth in these two exhib its respectively are the dates of the first use of the names therein stated?

MR. HOPGOOD: First use as to the events described by the documents.

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THE COURT: Yes.

(Plaintiff's Exhibits 77 and 78 were received in evidence.)

THE COURT: Are you through with the witness now?

MR. HOPGOOD: Yes, sir. No further questions.

MR.WELS: I have no further questions of Mr. Lee.

(Witness excused.)

MR. WELS: At this point, your Honor, defendant rests.

THE COURT:Both sides rest?

MR. HOPGOOD: Yes, sir.

THE COURT: All right.

Neither one of you want to call any more witnesses?

MR. HOPGOOD: That's right.

THE COURT: When do you gentlemen want to submit your final papers?

MR. HOPGOOD: I would be glad to submit them tomorrow, your Honor.

MR. WELS: Tomorrow is Wednesday, your Honor. If I could submit them by Thursday or Friday of this week.

THE COURT: My point is this, I don't want to render my decision without these minutes.

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ROBERT M. LEE, having been first duly sworn, was examined and testified as follows:

MR. HOPGOOD: This deposition is being conducted pursuant to order of the Court by Judge Metzner, and a copy of that order was sent to the other side last week.

MR. WELS: Received last Thursday by me.

DIRECT EXAMINATION

BY MR. HOPGOOD:

Q Will you please state your full name, your age and residence.

A Robert M. Lee; my age is 42, and my residence is 700 Ibsen Street, Woodmere, New York.

Q What is your occupation?

A I am the principal of Hunting World, Inc., and Lee Expeditions, Ltd. I am the president of both firms

Q What is the address of these two companies?

A We recently moved. Our new address is 16 East 53rd Street, New York 10022.

Q Since when has that been your address?

A We moved, we effectively started doing business there on or about May 1st. Our former address was 247 East 50th Street, for approximately three years.

Q Is that the same address for both of these

companies?

A Yes.

Q You said for approximately three years.

A At 247 East 50th Street for approximately three years. I think we opened there in April of '67 at East 50th Street; March or April, '67.

Q Did that mark the beginning of Hunting World, Inc., or was it in some other location prior thereto?

A No, Hunting World, Inc. started in 1965 at 420 East 51st Street. And Lee Expeditions, Ltd. was formed in 1959 at 700 Ibsen Street in Woodmere, Long Island, and it had a few other addresses in the interim period.

Q That would be your home?

A Yes. Lee Expeditions, Ltd. in the early years did not require a commercial address because most of our business was at that time conducted through correspondence, and I was in Africa much of the time.

Q Well, was the 420 East 51st Street address the one which applied prior to 247 East 50th?

A That is right. That address went back to, I think, 1962. '62 or '63.

Q What address?

A 420 East 51st, for Lee Expeditions, Ltd. prior to Hunting World. Hunting World is an outgrowth of Lee

Expeditions, Ltd. Lee Expeditions, Ltd. preceded it and they run together, but Lee Expeditions, Ltd. is the controlling company.

Q. What is the distinction in business as between Hunting World and Lee Expeditions?

A Hunting World is primarily engaged in marketing in America of products under the Hunting World name. Lee Expeditions, Ltd. is primarily engaged in arranging safaris and expeditions in Africa, Asia, India, and in searching for the products which it imports for distribution through Hunting World.

Q You said safaris and expeditions; is there a difference?

A Yes. Normally, normally I would call an expedition to the Antartic an expedition. I would call an expedition in Africa a safari, but the word now has been so widely used that outfitters up in Alaska who take hunting trips call them Alaskan hunting safaris.

I guess they have just -- they just think it is a better sounding word. People in India are calling shikars, which is the proper -- that's s-h-i-k-a-r-s -- many Indian shikar outfitters are calling themselves safari outfitters.

Q Does shikar mean an expedition?

A Shikar means hunt. It means a hunting trip, really. And a shikari is the equivalent in India of a hunter or white hunter in Africa. In other words, when your refer on an Indian hunt or shikar to your gentleman shikari, you mean your Indian equivalent of the Kenyan white hunter or guide; the gentleman shikari in India is a guide. The white hunter in Africa is a guide.

Q Do you know Abercrombie & Fitch, the plaintiff?

A Certainly.

Q How long have you known of them?

A Since about the age of eight.

Q Have you received their catalogues?

A Yes.

Q Do I take it you had been a frequent visitor of the store?

A Yes, and a friend of the store.

Q I am glad to hear that.

A We still recommend customers to Abercrombie & Fitch practically every day in the week for something that we don't have. And Abercrombie & Fitch, I might add, has been a customer of ours. I think I have had a charge account there since I was 17.

Q I have had a look at some of your advertisements and have seen the word chukka. What does that mean?

A A chukka boot or chukka shoe is a very broad reference to an ankle-height demi-boot or simply boot which has been made in many countries for many years out of various materials, leathers, primarily leathers.

Q Is that the sort of thing that my kids recommend to me called a floater?

A No, a floater is a trademark, I believe, of a company named Bates.

Q Is it that sort of thing?

A Yes, if it is ankle high. Bates make chukkas, many people make a chukka and call it a chukka. Chukka has become, well, as popular in the shoe industry as loafer has been, you know, I mean everybody has their own idea of what a loafer looks like. This is a loafer, a type of loafer.

Q What you are telling me is it means or has come to mean an ankle-height type of boot?

A An ankle-height boot. I think that the most perfect interpretation, I mean, I think it started out as being an ankle-height boot made from a reversed calf skin or a reversed cowhide, with the flesh side out or the sueded side out, and the smooth side in.

The cheap ones are made of a split cowhide, which is flesh side on both inside and out. It is not as good

because it is undersplit of the leather rather than the top grain.

The idea for reversing it and leaving the sueded side out is so it doesn't get all scratched up and scuffed under rugged conditions such as climbing around in rocks or going through thorn bushes, and so on, which tears the hell out of top grain leather.

Normally, the typical chukkas that I referred to have crepe rubber soles, the unvulcanized plantation crepe rubber soles.

This is the -- the typical safari chukka is exactly the type of shoe that I described.

Q As I understand you, the word chukka has come to mean a broader type of thing?

A Yes. In other words, someone might make a dressier shoe even with a leather sole, which certainly is not suitable for safari conditions, and they might call it a chukka. I have seen even top grain shoes of this general dimension called chukkas, not called safari chukkas, and they would be wrongly called safari chukka. The safari type shoe is, as I have explained, sueded outside, either made of reverse calfskin, or cowhide, or other material leather, and generally with a crepe sole or other type of rubber sole.

Q But it is not such a chukka if it has a hard or leather sole?

A Other people do call it a chukka with a hard sole. But I wouldn't call it a typical safari chukka by any means.

Q Other people might use artificial uppers that have a suede look to them but still that could be in today's parlance a chukka?

A Yes, it could be in today's parlance a chukka, or they might make it out of a split leather or just about anything else.

Q In your business with Hunting World, I take it with the various changes of address the business has grown?

A Yes, it has.

Q In connection with this business, do you have any of your own trademarks?

A Yes, we do.

Q What are those trademarks?

A I am not sure that I can remember all of the trademarks, but Hunting World is a trademark, KALAHARI is a trademark, SOMBRELLA is a trademark.

I will just quickly glance through our catalogue and see if I can pick a few more. MINISAFARI is a

trademark referring to a real safari hat imported from Africa that's had the brim cut down, in other words, the crown is the exact same crown used on the same manufacturer's full size safari hat, but the brim has been cut down. And the manufacturer named it the MINI SAFARI and gave us permission to use it here.

LOAFAROUND is a trademark referring to special types of footwear such as the one I am showing you now, which is a mocassin with a special sole primarily designed for sports car driving.

But we find it to be generally a very comfortable all-purpose loafing shoe, casual.

CAMELS is a trademark referring to the various items manufactured to our specifications of genuine camel leather.

SUPERCUBE is a trademark referring to a modular furniture system.

I may have omitted one or two, but these are the things that we use.

Q It seems to me I remember seeing SAFARI with a gun-cleaning outfit there.

A Oh, yes, that is a registered trademark to the best of my knowledge of Parker, Hale, Ltd. of England, who also do business with Abercrombie & Fitch,

and Abercrombie & Fitch to the best of my knowledge sells the same kit, and that is Parker, Hale's registered United States trademark, I am quite certain.

Q You are?

A Yes.

Q Did you check?

A I remember seeing it sometime ago; in fact, Dick, you may have a record of it in your search. But Parker, Hale has marketed that for many, many years under that trademark in America. And it is theirs, I am -- I am really certain. It is a gun-cleaning outfit.

MR. WELS: What is it called?

THE WITNESS: SAFARI.

Q I am not so certain -- I will not argue with you, but I don't want you to go around with a misconception. I am not so certain it is a registration of theirs in this country, and my information is that they have withdrawn the use of that mark on the goods, at the urging of Abercrombie & Fitch.

A Well, it is my understanding --

Q And to use it is improper, I am letting you know that now. I seem to recall your use of the letters TM alongside of something else. Does TM mean trademark?

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A Yes.

Q I think I have seen it for SAFARILAND?

A Right.

Q Is that a trademark of yours?

A That is a trademark of ours.

Q What does it connote?

A It connotes a location, that is, a shop or a portion of a shop, a SAFARILAND boutique or a portion of a shop, and it also is the name of a New York corporation called Safariland, Ltd.

Q Is that part of your organization?

A Well, it is a company I own.

Q Is that related to these other two that you gave us?

A Yes, it is involved in the wholesale distribution of products imported by Lee Expeditions, Ltd.

Q That is wholesale while Hunting World is retail; is that it?

A Right. Hunting World did some wholesale, but now Safariland is doing -- for sometime now Safariland is doing all the wholesale.

Q When did Safariland, Ltd. start?

A I don't know.

THE WITNESS: When was that?

MR. WELS: '68 or '69, I am not quite sure.

Q Is that at the same address, East 53rd Street, now?

A Yes.

Q I will ask to be informed exactly when that was started.

A All right.

Q Did the incorporation of Safariland, Ltd. begin your use of the expression SAFARILAND?

A Oh, no, no. We started Safariland News, which is a newsletter published at irregular intervals over the past approximately 11 years, published by Lee Expeditions and Hunting World.

Q That was just a newsletter, wasn't it?

A Yes, Safariland was a -- Safariland News was a newsletter informing our prospective clients of various -- of hunting conditions in various areas in Africa, primarily, where we worked, and also in Nepal at one time.

Q So Safariland News was addressed to your hunting clientele in Africa and --

A Right, and it was also given to people who came into Hunting World and inquired about our safari offerings.

Q When did you start using it for this shop or portion of this shop or boutique?

A In 1967 when we opened our -- Hunting World's first shop, which at that time was referred to as our Safariland Showroom, in March of April of '67 on East 50th Street.

Q Was that then, so to speak, the name of the shop and its operation?

A Well, the name of the shop was Hunting World, and Hunting World called the shop our Safariland. In other words, Hunting World's Safariland.

Q In other words, everything that was sold and offered for sale in there was under that catchall category of Safariland?

A Well, I wouldn't say that. I would say everything that was sold in the shop was sold under the Hunting World label in one form or another and was packaged with a Hunting World bag or package or something. But the majority of our advertisements said more or less, "Visit our Safariland Shop or write for our catalogue," and then the large logotype under that was "Hunting World."

Q But when you in your ads directed the prospective customer into your shop, did not the mention of Safariland there show TM?

A Yes.

Q Have you ever taken any steps to apply to

register the trademark?

A I don't remember. I quickly went over a lot of our trademark applications this morning because I didn't receive this list until the weekend, and I don't remember if we have SAFARILAND registered. I will go through it again.

Q I am asking whether you applied for or registered it.

A I don't remember, I don't remember. We have applied for a number of trademarks, but we have always used the TM, which is a proper way of indicating that it is a trademark,to the best of my knowledge, whether registration has been granted or not.

I don't have all of them here, but I have got some. I will look through it again.

Q Maybe if Mr. Wels lead you on this --

A No, I did all the trademarks myself. It is a rather simple thing that I didn't want to bother Mr. Wels with.

(Witness examines documents.)

THE WITNESS: I can't find them. I think we do have more applications than I have with me.

Q I will just place on the record a request then to be supplied with a copy of any application which may have been filed or a registration which may exist.

We have asked for that in the attachment to our notice.

THE WITNESS: The word SAFARILAND?

Q SAFARILAND; of course I will ask the same question as to a couple of others. The record should show you were notified specifically to bring what I have just asked you. It was Item 9 in the attachment to the notice.

MR. WELS: May the record show, Mr. Hopgood, that we received this notice from you in the mail last Thursday and that we then sent it on to Mr. Lee, who didn't receive it until Friday.

THE WITNESS: I did my best to find all of our various folders on trademark applications, both on Saturday and this morning. I would like the record to show that we moved very recently to our new address, that we still have various papers and records in cardboard cartons that haven't been opened, and that our filing could be in much better order than it is at the present time. It may take, in fact, some weeks to get straightened out.

BY MR. HOPGOOD:

Q I appreciate your difficulties, but at any

rate you did say you handled the trademark matters yourself?

A That is right.

Q So you must be familiar with the practice of describing goods, and so on, as necessary to obtain a registration?

A Yes.

Q In the case of SAFARILAND, how did you or would you describe your goods?

A I would describe SAFARILAND, and if I had made the application -- as I say, I really don't remember if we ever filed for it -- but I would describe SAFARILAND as a store or a portion of a store, or a boutique section of a store, selling the type of merchandise that Hunting World sells and catalogues.

Q You are familiar with the Patent Office classifications, aren't you, for registering trademarks?

A Well, I am not really familiar. I will fill out an application to the best of my knowledge and then sometimes the Patent Office will write back and say, well, you can't register this for these categories, but can you narrow it down to a more limited category and then file the same name again for something else.

Q Let me see if I can help you without

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burdening you with that list of classifications.

How about clothing, would that be one of the articles in connection with your mark SAFARILAND?

A No, we wouldn't specifically put SAFARILAND on clothing. In other words, SAFARILAND has not been a mark applied to merchandise, it has been a portion of a shop. Visit our SAFARILAND Shop or our ~~SAFARILAND Shoproom~~ or our SAFARILAND Boutique, may be stated in ad, but in actual fact the merchandise carries the trademark Hunting World, not the trademark SAFARILAND.

Q But when people are referred to this boutique or shop, the kind of articles they buy there --

A Are Hunting World items.

Q Let's get down to what they are. They are articles of clothing?

A They can be articles of clothing. We sell a wide variety of merchandise. We have fine arts, we have bronzes, we have paintings, we have reproductions of paintings, we have footwear, we have leather goods of many, many, many different descriptions.

Q Meaning luggage?

A We have luggage. We have belts, wallets.

Q How about the varieties of clothing?

A In clothing we have safari clothes, imported from

Africa; genuine safari clothes I refer to, I don't refer to safari --

Q Let's go by ordinary words that most people understand.

How about jackets?

A Safari jackets.

Q Just please answer my question.

A Everyone understands a safari jacket is a safari jacket.

MR. HOPGOOD: I move to strike as non-responsive and self-serving.

THE REPORTER: Is that initial capitals S-a-f-a-r-i J-a-c-k-e-t in your last answer?

MR. WELS: Yes, I think it is.

Is that right?

THE WITNESS: Small "s."

MR. WELS: I stand corrected.

MR. HOPGOOD: We will let your usage show.

THE WITNESS: Our trademark -- may I continue for a moment?

BY MR. HOPGOOD:

Q I am in the process of trying to identify with you articles of clothing, and we mentioned jackets. How about shirts?

A At present we do not sell any shirts.

Q How about shorts?

A Yes, we sell shorts.

Q And slacks?

A We sell slacks.

Q Skirts?

A We sell culotes, culot skirts. culotte culotte

Q Meaning an article for women having the appearance of a skirt but having the function of pants?

A Right.

MR. WELS: As a divider.

Q How about socks?

A No, not at present.

Q Scarves?

A Do we sell scarves?

Q Yes. I am talking about what articles are sold in your SAFARILAND shop or boutique.

A Yes, we sell scarves.

Q Hats?

A Hats.

Q Caps?

A We don't have any caps, but we may at some future time have them.

Q Angler's clothing?

A We do not specifically sell clothing for anglers. In other words, at the present time we do not have items that we recommend or sell specifically for anglers such as fitted jackets, fitted with the various things that a fly-fisherman might use, but these are items that we intend to sell in the future.

Q They would still be out of your SAFARILAND Shop?

A Well, yes, they would be sold out of our present shop.

Q How about gloves?

A Yes, we sell gloves. We sell hunting gloves.

Q How about caps?

A No, we don't have any caps.

MR. WELS: He has already answered no to caps.

MR. HOPGOOD: I am sorry, I forgot I said it.

THE WITNESS: That's okay. Have you seen a copy of our catalogue, sir?

MR. HOPGOOD: Yes, but I have committed it to memory.

A Belts, we sell belts. You are still on clothing?

Q Yes.

A We sell a shooting vest.

Q Sweaters?

A No, not at present.

Q Raincoats?

A Not at present.

Q When you say "not at present," does that indicate or suggest any intention to go into it?

A Well, we may. It is not a top priority item for our expansion, but if we see something unusual, we may take it in.

Q I guess that covers the spread of clothing any way.

I would like to interrupt my questions to ask another which I did not pursue because I would like to understand a demarcation between kind of business.

You mentioned wholesale business in connection with SAFARILAND, Ltd.?

A Right.

Q As distinguished from what is now the retail business of Hunting World, Inc.

A Yes.

Q Can you tell me the kinds of goods for which this wholesale business applies?

A Well, we will sell just about everything through SAFARILAND, Ltd. to our wholesale customers.

Q Who are they, in general?

A In general they are retail stores.

Q Retail stores, you mean like Abercrombie & Fitch?

A Yes, Abercrombie & Fitch.

Q You mean retail stores in this country primarily?

A Yes.

Q And across the country?

A Across the country.

Q I would like some more details; if you can give me some typical ones -- I am not trying to get the whole list.

A Of stores? I don't know whether or not we should reveal any of our customers.

THE WITNESS: If you say I can, I will.

MR. WELS: Yes.

A We sell to Saks Fifth Avenue, we sell to Nieman, Marcus.

Is two enough?

MR. WELS: I think that is enough.

Q Are they both in this city?

A No; Saks is in this city, Nieman, Marcus is in Texas.

MR. WELS: Saks is also outside of the city.

THE WITNESS: Yes. We deliver to them in the city. We don't know where they redeliver to.

Q I think we ought to have maybe five in all, if you can just give us that, to have some spread.

A B. Altman's and Bloomingdale's.

Q Those are all in the city here, primarily?

A Yes.

Q How about something recognized as elsewhere in the country? Are you in San Francisco?

A I think we have done some business in San Francisco with a company called Haverhill's.

I would like to note for the record that the merchandise that we sell to our various wholesale accounts are sold under the Hunting World label or the Hunting World mark, and that the -- I would say the only other trademarks used on the merchandise that we have sold has been the trademark KALAHARI.

Q Whatever it is, you have the standard label or tag or what have you?

A Yes, we have a label which says Hunting World or KALAHARI, and some of the trademarks that I mentioned before like MINI SAFARI and LOAFAROUND.

Q Does SAFARILAND, Ltd. wholesale business get promoted in a separate catalogue?

A No.

Q You just rely on the regular Hunting World catalogue?

A SAFARILAND, Ltd. publishes a wholesale price list and that wholesale price list refers to Hunting World's catalogue numbers.

Q Does this have all the articles that you find in the Hunting World store?

A There are a couple of lines that we sell at Hunting World that we are not the source of and that we cannot wholesale.

Q It is only where you have made the goods or procured them exclusively?

A Right, which applies to most of our items.

Q Actually, you don't make any of them?

A We have them made.

Q Where do you have your goods made?

A By various contractors in various African countries, in Europe, and in the United States.

Q Let's see if we can get the namesof the countries. You said Africa.

A South Africa, Kenya, Portugal, Italy, France,

England, Austria, Japan, Iran, Spain, Switzerland; did I mention England?

Q You did.

A I think that's about it. America.

Q What do you have made in England? You mentioned Parker, Hale, but --

A We have primarily small leather goods and shooting accessories, fishing bags, game bags. That's about the extent of the range of this merchandise. Gun cases.

Q What is made in Portugal?

A Primarily shoes, silver articles, lady's handbags, hats; these are the major items.

Q Is that where the MINI SAFARI is made?

A No, the MINI SAFARI is made in South Africa.

Q How about Italy?

A Right now one style -- two styles of hunting boots. But we intend to expand our business in Italy in the leather goods field, primarily.

Q Well, you mentioned leather goods in England. Does that include shoes?

A No, we don't import any shoes from England.

Q The reason I asked, I seem to have a recollection seeing in your promotional materials a reference to English craft in connection with your shoe

products.

A No, you may have seen a reference in connection with British craftsmanship with respect to some of our small leather goods produced for us by Finnigan's of London. Wallets, billfolds, wetpacks, referring to men's shaving, a leather or some other type of gadget bag for men's toilet articles.

Q How about France, what is made in France for you?

A Right now -- well, our shooting glasses, two styles of shooting glasses. But we are also starting a whole new range of small leather goods made in France. They have not been marketed yet.

Q That wouldn't include shoes, will it?

A I don't think so.

Q How about Austria?

A Gloves.

Q Japan?

A Ivory carvings.

Q Iran?

A A certain type of hat, a knitted hat.

Q You mean like for the wintertime to pull down over your ears, and so on?

A Yes, the type that you pull down over the ears.

Q Spain?

A Leather goods.

Q Does that include shoes?

A It does not.

Q Switzerland?

A A novelty, an adult toy called Doodling Balls. They are magnetic balls that they can play with.

Q Like Commander Queeg?

A That is right.

Incidentally, it has been a very successful item. It is a high quality little adult toy and it is nicely packaged, and we have advertised it with great success in the Wall Street Journal, the New Yorker, and so on. I think we are going to start advertising it again in the Wall Street Journal on a daily basis. Something has got to happen to improve the market.

Q Do you have anything made in the United States?

A Yes, we have wallets, belts, other small leather goods; very little else, actually, and some shoes. And also our fur pillows and some of our fur rugs are fabricated here, that is, the imported skins are made up here into the finished article.

Our bronzes are cast here, and some of our glassware

is made here. Some of our furniture. I think that's about the extent of what we have made here.

Q I seem to recall you had a Safari Director Chair; is that made here?

A Yes, that's made here.

Q There appears on page 9 in the 1970 catalogue, the Safari Director. You also have at the bottom of the page another one called Safari Wing Sling; is that made here?

A Yes, it is made here; ~~the pattern is a pattern in both of them~~ -- all three chairs on that page are very typical styles that have been used on safaris and expeditions in the old colonial British and French empires for generations. There is nothing new or original about them. The Safari Director is the type of chair that we have used on our safaris for -- well, as long as I have been in the safari business, for 11 years. Only we have used it on safari with a canvas cover instead of a zebra skin cover.

Q Sort of like a captain's chair used on a boat, isn't it?

A Yes, they are used on boats, they are used on movie sets. That's why we put director in there, because it is also a director's chair. Safari came first and Director

came second in the history of the usage.

Q It could be used anyplace around home, couldn't it?

A Oh, sure. We sell it as a casual chair. The middle chair on that page, the one we call the Adventurer, is often referred to as the BOC chair, or British Officer's chair. That type of chair is also used on safari, but not with a genuine zebra cover; it would be used with a canvas cover. It is a chair that comes apart; it doesn't fold.

MR. HOPGOOD: I would like to mark as an exhibit this page we have just been talking about so that the text can have some meaning.

Q I notice that the catalogue I have doesn't go through the printer's process too well, so that some of the language is clipped off. Maybe you can let me have one.

A I will give you a clean one.

MR. WELS: That is page 9 of the 1970 catalogue?

MR. HOPGOOD: That is right.

THE WITNESS: I will leave this with you at the end of today's session, but you can look at it.

MR. HOPGOOD: I will call this PDX 1, meaning Plaintiff Deposition Exhibit 1.

(Document above referred to was marked PDX 1 for identification, this date.)

BY MR. HOPGOOD:

Q What in general can you say -- I would like to get into your advertising and how you direct it, the cut of people, and so on.

Let's start with the kinds of advertising you do.

A Do you want me to list the types of advertising?

Q Yes, because I assume you are more familiar with it than I am. I don't want you to give a great, big speech, but I think you can give us some general categories so we can have something to get started with.

A Fine. We do one or more catalogues a year.

Q Of which this 1970 catalogue is a speciman?

A Is a typical speciman, yes.

Q You do generally one of those a year?

A Generally one. We hope to do more than one. We do a catalogue of the bronzes of Dr. James L. Clark, which is an 84-page catalogue which is not changed from year to year.

Q That is specifically to the bronzes?

A Just his bronzes and bas-reliefs.

Q When we are asking about this advertising, we are asking about Hunting World or the kind of things that you promote to get people to come into this SAFARILAND Boutique.

A Let me clarify the SAFARILAND boutique. Hunting World is not presently a SAFARILAND boutique. We call it a SAFARILAND shop. I want to be perfectly plain on this, that we hope to establish and will use the word SAFARILAND in connection with boutiques which we will own.

Q Maybe you can clarify it for me, I have never really understood what a boutique is. I thought I was adopting your word.

A No. Well, I am not going to define the word boutique, but I will define what a SAFARILAND boutique will be.

It will be a small area in another store, in a store other than Hunting World, which will be called SAFARILAND, and it will merchandise some of Hunting Worlds' articles.

Now, our SAFARILAND shop is a shop, a shop that sells a wide variety of merchandise that you see in Hunting Worlds' catalogue.

Q So these SAFARILAND areas in other people's

stores, is that a franchise kind of operation?

A Well, we are not sure yet whether it will be ~~leased~~ departments that we will lease or whether they will be franchises that we franchise. I mean, the plans for this are not -- have not been formulated.

MR. WELS: You are asking for the definition of boutique.

Q I was concerned with the advertising. I am anxious to have you tell me about the kind of advertising that promotes the kind of goods we are talking about.

I didn't know whether the bas-reliefs and bronzes are part of this SAFARILAND operation.

A We sell bronzes and bas-reliefs at Hunting World.

Q All right.

A We also sell fur rugs and pillows at Hunting World. We sell everything that you see in this catalogue at Hunting World.

This is a typical ad of our safari shoes.

Q This is an insert in a newspaper?

A Yes, this is a proof of an ad that recently ran in the New York Times, and our reference number, we started a new way of identifying for our own filing our ads; that's Plate No. T-6.

Q That appears in the ads?

A Yes, and it is going to be changed to T-7, and this will be scrapped because of price change, but this did run once or twice.

Q You say this is fairly current?

A Yes.

Q Can we mark that?

A Yes.

(Proof of ad beginning "Safari shoes from SAFARILAND" was marked PDX 2 for identification, this date.)

Q You said, I believe, that this was in the New York Times?

A Yes.

Q Do you have a particular pattern of hitting the New York Times?

I know I have seen your ad, the one that gave rise to my part in the correspondence before this litigation, in the Sunday Magazine Section.

A Yes.

Q I don't know, is this the Sunday Magazine Section?

A Not currently, we haven't advertised in the magazine much, if at all, this year. I don't think I had any ads running this year in the magazine, but we will resume

again in the Times Magazine.

Q What part of the New York Times does this Exhibit 2 appear in?

A The body of the paper, the main section.

Q On Sunday or during the week?

A We have only run that during the week.

Q How often do you run or have you run this particular ad?

A I really don't remember, but I can say that in one form or another, this happens to be our latest version of it, but in one form or another, we have run it, I think -- a fairly accurate guess might be 15 times in the newspaper. I don't know, a few times in the magazine.

Q Are you talking when you say one form or another about --

A General format, art work.

Q (Continuing) -- about the safari chukka which is the subject of this ad?

A Yes, that's the one I am talking about. That's imported from Kenya. That's our original safari chukka boot, imported.

THE WITNESS: Here is our MINI SAFARI; this was advertised December 8th at our former location, but it is very similar to the ad that

we are running now; about the only change is the address change.

This is another ad.

MR. HOPGOOD: This is the one that begins, "The safari hat for town and country is here."

I would like to mark this as the next exhibit.

(Document above referred to was marked PEK 3 for identification, this date.)

Q I was trying to get at the cut of people that you hit with your advertising. Of course, the New York Times gets a pretty broad readership, but are you trying to hit any particular area of the readership? Are you making any particular appeal?

A Well, we appeal to active people, to outdoor people. We also appeal to people that want distinctive gifts who may not particularly be outdoor people.

Generally we do appeal to the more affluent segment of the society. On the other hand, we do have a good many products that are of very broad appeal, that could appeal to practically anybody.

Q I just wondered, I saw this expression in the caption for the ad of Exhibit 3 where it says, "For town and country." Is that sort of taken in by your description of the affluent people who want to be distinctive?

A Yes, that had appeal to the well-dressed man. That's one of our bi[illegible]t selling items and it appeals to the well-dressed man for casual wear, not necessarily to a guy who wants to go on safari, but he likes the idea of the authenticity associated with our safari clothes.

And this is a hat that is made in South Africa and is sold in South Africa as a casual sport hat. It is made by the same people who make the full-size safari hats which we sell and which Mr. Earl Angstadt, incidentally, was very much interested in purchasing a few years ago from us.

Q It says here in the ad, "Hurry up, men, before the girls beat you to it."

Now, what is the point in that? Does that mean girls are supposed to be interested to?

A Girls are wearing these hats, too.

Q You are appealing to them also?

A Yes. Well, was very much interested in our bigger safari hat.

Q What is a pleated silk puggaree band?

A I better show you what it means.

Q I am sure it means something stylish.

A Well, it is a very traditional type of hatband that

has been used on safari hats and on pith helmits, and a number of other types of headgear designed for sport or active outdoor work for many, many years. It is quite traditional. Here it is.

MR. HOPGOOD: I think the record should show that the witness has just produced a hat to illustrate his answer with regard to the puggaree band.

THE WITNESS: Pleated silk puggaree band. You can see the pleats, you see. And it is attached with a hat hook, the same as any other hatband is attached.

Q It is just a plain tan --

A That's beige or tan. The hat body, we call that color impala brown.

Q I was looking to see if you had any marks on this. You called it the MINI SAFARI, but I see Hunting World in here.

A Here is Hunting World and here is Dorian MINI SAFARI. It is made by Dorian, that's the maker. They call it the MINI SAFARI in South Africa, too.

Q Are you looking at some catalogue entry there?

A Well, I don't know. You can look at it.

MR. HOPGOOD: The witness has just produced --

Q What is that, a reprint of an ad?

A It is a proof of an ad run by the manufacturer in South Africa, run in two languages, in English and in Afrikaans.

MR. WELS: The Afrikaans is on the reverse side.

MR. HOPGOOD: I can't read that.

THE WITNESS: That was printed in South Africa. It was sent to us as a suggestion of advertising style, but we didn't like it. That refers to the big safari hat which we sell, the one we call the White Hunter.

BY MR. HOPGOOD:

Q You are referring to the so-called Dorian safari?

A Yes. Which we call the White Hunter in our catalogue.

Q That is a hat that you sell, the one that the fellow is wearing above the description?

A That is right, yes. That hat is illustrated in our 1970 catalogue on page 67.

Q I see that that has a pretty wide brim.

A Yes, that's the big safari hat.

Q You mean when you are going on a big safari you wear a big one?

A No, this is the hat, the brim size that's most popular on safari, the big brim.

Q Isn't that because you want to have shade?

A Shade, yes.

Q Comfort to the eyes, or something?

A Yes, more protection for the back of the neck from the sun and more shade for the eyes. That is a three and a half inch brim whereas our MINI SAFARI is the same hat made on the same crown block, but with the brim cut down to two inches.

Q So that that would give less protection from the heat and sun?

A Less protection against heat and sun, but I personally have been wearing this one on safari for the past several trips. I like it better because I can travel wearing this hat, but I can't very well travel wearing that great big brim. And it is a nuisance to pack. I find this brim gives me enough protection. I wear sunglasses anyway.

MR. HOPGOOD: I would just like to mark some of these things before the articles outstrip

the transcript.

THE WITNESS: Let me make a xerox of it.

MR.HOPGOOD: We have a xerox. Let's mark this Dorain hat reprint, we don't have to go into the South African language, just the English side, as the next exhibit, which is PDX 4.

(Document above referred to was marked PDX 4 for identification, this date.)

THE WITNESS: The only one I need back is that one; I can leave the others.

BY MR. HOPGOOD:

Q What is the status of this hat that you have produced?

You want that back, no doubt?

A Yes.

Q Will you let us have it for awhile so we can at least make photographs?

A I can give you -- it is photographed in the catalogue.

Q I mean the mark on the goods.

A Oh, sure. You can just give me a memo on it and you can keep it.

MR. HOPGOOD: Let's mark as Exhibit 5 --

THE WITNESS: You don't have any objection to that, do you?

MR. WELS: Not at all.

THE WITNESS: We should ask Abercrombie & Fitch to buy one.

MR. HOPGOOD: Let's mark as Exhibit 5 -- we will undertake to take a photograph and the photograph can take the place of the hat, even then the photograph will be the exhibit. Is that all right with everybody?

THE WITNESS: Fine.

MR. WELS: That's all right.

MR. HOPGOOD: In that case, Mr. Wels, are you insistent that the reporter sign for identification the tag or whatever?

MR. WELS: I will stipulate.

MR. HOPGOOD: The hat will be deemed marked Exhibit 5.

(Hat above referred to was deemed marked PEK 5 for identification, this date.)

BY MR. HOPGOOD:

Q Before we leave that hat, I don't remember being told what puggaree is.

A Puggaree is the type of pleated hatband.

Q In other words, all kinds of pleated hatbands are puggaree; is that it?

A No, it is a particular style of pleated hatband made of silk or other material. It is generally applied to the safari type of hat, or the pith helmet, and on certain types of straw hats generally worn under tropical conditions.

I think that it is most easily and readily identified with hats worn in Africa or under tropical conditions.

Q Are you still in theprocess of letting us have representative advertisements?

A Pardon?

Q Are you still in the process of letting us have representative advertisements?

A Yes. Well, here is the same safari shoe, the safari chukka advertised in the New Yorker.

MR. HOPGOOD: This is an advertisement just produced with the caption "Safari shoes from SAFARILAND." Let's mark that as the next exhibit number, which makes it PDX 6.

(Document above referred to was marked PDX 6 for identification, this date.)

Q Incidentally, is this the same shoe as the other, Exhibit 2? I know the photograph is slightly different, but is it the same shoe?

A It is the same shoe.

Q You are talking about Exhibit 2 when you say this is?

A Exhibit 2 is the same shoe with a difference in price of $1. It went up $1. This exhibit -- is this 6? Exhibit 6 was July 19, 1969. This Exhibit 2 was about a week ago when they went up $1.

Q So the only difference is price?

A Yes.

Q I notice that the ad of Exhibit 2 refers to men's or women's sizes, so I take it you sell this to women as well?

A Yes, we do. We sell that to women as well; and the illustration is different because in the New Yorker we used a photograph and in the New York Times we used a drawing.

Q This New Yorker magazine, is that one of several magazines that you advertise in?

A Yes.

Q How frequently do you advertise in the New Yorker?

A Frequently, more or less one ad a week.

Q How about other magazines? What other magazines?

A We are not advertising heavily in magazines other

than the New Yorker this year. In fact, I don't think we have advertised at all this year in other magazines with the exception of trade magazines.

Q All right, then, trade magazines; would you run this ad in a trade magazine; is that what you are telling me -- Exhibit 6?

A No, the only trade magazine that we advertised in this year was either American Shoe Making or one of the shoe trade publications with reference to our selling elephant leather to manufacturers.

Q That is a wholesale business?

A A wholesale business. We sell elephant leather to manufacturers. Now I am trying to -- we advertise in the Wall Street Journal, which is another newspaper.

Q How frequently do those ads run?

A We have a daily contract, five days a week, at present.

Q Have you a sample of such an ad?

A If you have a Wall Street Journal, we unfortunately were omitted from today's we were supposed to be in today's but were omitted. But if you subscribe to it here in the office, you will see our ads in all last week.

No, I don't have one with me, but if you care to look at them in our office --

Q I would like to have them sent to me, typical of the kind of things you advertise in the Wall Street Journal.

A I can't send you the whole file of everything we advertise, but I will be glad to let you go through it.

Q That's not a bad invitation; I will take you up on it.

A Okay. Well, you go ahead. If I find one here, I will give it to you.

Q Before I leave this ad of Exhibit 6, I notice it is also true of Exhibit 2, it is also true of Exhibit 3, you make reference to the invitation to visit the SAFARILAND shop.

A Yes, we do.

Q Is that typical in all your ads?

A That's typical. I don't know if it is in all of our ads, but it is in the majority of them.

Q I see you have some more ads there. Could we see them, please?

A Yes, this is the same shoe again, but an earlier version of the ad run more or less a year ago, I see.

Q This is the New York Times?

A Yes. Then here is the Times Magazine.

MR. WELS: Off the record.

(Discussion off the record.)

MR. WELS: Here is a Wall Street Journal.

THE WITNESS: Here is the MINI SAFARI hat from the Wall Street Journal. Yes, this ran very recently, since May 1st.

BY MR. HOPGOOD:

Q The message has been torn a little bit, but it appears to be very much like the ad that we marked Exhibit 3.

A Yes, this safari hat for town and country is here.

Q It has the same subject lead in?

A Yes. Whether the copy is exactly word for word, we don't know, because sometimes space limitations require us to alter or omit ad copy.

MR. HOPGOOD: Let's mark then the hat ad you have just produced from the Wall Street Journal recently as PDX 7 for identification.

(Document above referred to was marked PDX 7 for identification, this date.)

Q That has the caption, "The safari hat for town and country is here."

A That is right.

Q This one is also the New York Times?

A Yes.

Q This is an ad you said was about a year ago, New York Times, entitled ("Safari shoes) from SAFARILAND," directed again to the safari chukka?

A Yes.

MR. HOPGOOD: That will be Exhibit 8.

(Document above referred to was marked PBK 8 for identification, this date.)

THE WITNESS: Would you like another ad?

Q Let's see it.

A This is a South African version of a similar shoe. In the Afrikaans language they call them feltskins, "FELTSKOINS" please spell that phonetically because I can't spell Afrikaans, but it is pronounced feltskins, and the literal "FELTSKOINS" translation of it is veldt boots or veldt shoes.

Q This refers to SAFARILAND again?

A Yes.

MR. HOPGOOD: Let's mark that as Exhibit 9.

(Document above referred to was marked PBK 9 for identification, this date.)

MR. HOPGOOD: Exhibit 9 is for November 9, 1969.

Q Looking at this ad for the veldt boots, Exhibit 9, I see a refernece to KALAHARI SAND. Would you explain that, please?

A We use the trademark KALAHARI on a number of products, including all of our safari clothes. We call the cloth that our safari clothes are made of KALAHARI CLOTH. We also refer to that particular color, that particular sand color in the veldt boots as KALAHARI SAND. I mean, other people may call it desert sand or someone else might call it beach sand. Well, we call it KALAHARI SAND because it identifies more with us.

Q Is there a place in Africa called Kalahari?

A Yes, the Kalahari Desert is Africa's second largest desert.

Q Where is that?

A It is in Botswana and it also -- the extreme westerly portion of the Kalahari Desert goes into Southwest Africa.

Q Do all of your KALAHARI products come from that desert area?

A Well, they are made in the adjacent country of South Africa.

Q Are they meant for use in the desert?

A Absolutely. They are meant for use not only, not exclusively in the desert, but as a matter of fact, most of the safaris in southern Africa today are going into

Botswana, and many of them are conducted in or right around the fringes of the Kalahari Desert. I would say that the general Kalahari region is today the most popular region for safaris in southern Africa.

Q But this ad that you showed me and we marked Exhibit 9 is directed to the affluent people around here, isn't it?

A Well, I don't think that a person has to be particularly affluent to buy a $15.95 shoe. I think it is directed to all active people who would be particularly impressed by the fact that we have gone to the trouble of importing the genuine article from Africa, made by concerns whose livelihood depends upon selling rugged footwear to people of the African continent who use these every day under really severe rugged conditions. And that's why these shoes and our safari chukkas are made of top grain reverse leathers instead of split leathers that many of the copies are made from. That's why we use genuine leather in soles whereas many of the copies are made of composition or man-made insoles. That's why we use the more expensive plantation crepe soles, whereas many of the copies use a cheaper type of rubber sole.

It is an honest to goodness safari shoe made in safari country for active use, and people in this country

like the idea of being able to buy the genuine article.

Q It doesn't say it is a safari shoe, does it?

A It says it is a veldt shoe. In South Africa they call it a veldt shoe or safari shoe. But we have another safari shoe from Kenya by a manufacturer that has always called them safari shoes. So we prefer to have -- not to confuse the public with two different ones although they are both ideally suitable for the same purpose and they are slightly different in design.

Q It is addressed, isn't it, to leisure, it says, "Perfect for leisure wear anywhere."

A Yes.

Q Is this one in your wholesale price list -- Exhibit 9 -- the veldt boots?

A I don't remember because we are having an extremely serious supply problem with that particular shoe because we do not have -- there does not exist a specific commodity rate for shipping that shoe from South Africa to New York by air. And we have found that the pilferage on our ocean shipments have been so great that we have been wiping out our profits on the shoes. We haven't collected one insurance claim yet and the insurance companies keep throwing additional stumbling blocks in our way. They admit that the shoes were stolen, but they never

pay us.

So the only way to import shoes from our experience is by air, and the cost from South Africa would be prohibitive, whereas a good and workable air freight rate does exist from Nairobi to New York, and consequently the other shoe made in Kenya, the shoe in your Exhibit 6 and Exhibit 2, I believe, the safari chukka from Kenya, comes in by air and we are going to have this manufacturer make this shoe, make a shoe of this type which he has in his line already.

Q When you pointed to this you meant Exhibit 9?

A Exhibit 9, yes. The Exhibit 9 shoes, unless the specific commodity rate, a favorable air freight rate comes into being fairly soon, we will no longer import those veldt boots. Instead we will import another safari boot from Kenya made by the same maker that makes Exhibit 6.

Q Now I am looking right now, we are still talking shoes, at pages 36 and 37 of your 1970 catalogue. It begins, both pages, with the slogan, "Elephant is the name of our game." And reference is made to the, "The NOW shape in the NEW status leather."

Do you see that?

A Yes.

Q What is that kind of language meant to mean?

A It is meant to mean that Hunting World was the first company in the world, to the best of my knowledge, ever to market a full range of genuine elephant leather products made from our own leathers, from leathers that we supervise the preparation of from the acquisition of the -- in most cases from the acquisition of the raw leather to the tanning, through the tanning stage, and on to the sale or consignment of the skins to the manufacturers involved in the production of our line of elephant leather products. And our extensive advertising of elephant leather -- we are the only people, I want to clarify that, we are the only firm in the world, to the best of my knowledge and belief, that has actively and aggressively advertised a complete line of elephant -- of genuine elephant leather products of the very highest quality.

We offer these products to retail customers through Hunting World's catalogue in our shop, we also offer most of these products to our dealers. We call it the new status leather. We think it is. We think it is the greatest leather going nowadays.

Q You mean as a status symbol for the customer?

A That is right. And it is an extremely practical

leather. We don't think there is another leather that has the advantages of our soft tanned natural finish elephant leather. It is virtually scuff-proof because of the almost indestructible surface texture of elephant leather.

I also want to add in reference to elephant leather that our elephant leather is an excellent example of active conservation at work in as much as prior to our making the market for this leather virtually all of it, practically all of it was allowed to rot. And the skins ~~that we obtain~~ that our leather is made from are obtained from the various national parks services and are the result of the necessary cropping of surplus animals in the parks and reserves where, if they were not cropped, permanent and serious damage to the habitat would result.

So what we are doing is we are buying something that was formerly a wasted product and turning it into something useful.

Q On page 48 of that same catalogue, 1970, you are continuing with the coverage of your elephant skin promotion on shoes, aren't you?

A Right.

Q And it refers to elephant chukkas?

A Right.

Q For town and country?

A Yes.

Q I see in the text down there a reference to "[illegible]ently suitable for town and business wear."

A The leather sole for business wear. We make two styles of it. The one we recommend primarily for the country or for rugged use is the one that we call elephant trackers, which is illustrated in brown in the catalogue. We make it both in brown and in black.

Q You are now talking of page 48?

A Page 48, right.

Q Yes?

A And the more sophisticated or stylized version of the same shoe but with a different sole and buckle treatment is the one we call Elephant Jodhpurs, illustrated in black on page 48. And that shoe has a leather sole and a leather heel with a synthetic rubber heel tap. That's the one that we recommend more for town use. But the cut of the shoes are identical. In other words, the pattern, they are cut from the same pattern. The only things that are different are the sole and the buckle treatment.

Q I seem to remember that some of your other ads for chukkas showed laced up fronts rather than buckles.

A Never in elephant, only in the ones we import from Africa, the veldt boot and safari chukka.

Q Within your definition of chukka --

A It can be a buckle boot, yes.

Q It can be either?

A Yes.

MR. HOPGOOD: I think before I go any further I should mark the various spreads of pages we have been talking about, both of them out of the 1970 catalogue of yours.

First it was pages 36 and 37; let's mark that double-page spread as PDX 10.

(Documents above referred to were marked PDX 10 for identification, this date.)

MR. HOPGOOD: Then we were talking of the double-page spread of pages 48 and 49; let's mark that PDX 11.

(Documents above referred to were marked PDX 11 for identification, this date.)

Q Then I see another reference to chukkas, page 71, where it is called Camel Safari Chukkas.

A That's the same type of boot.

MR. HOPGOOD: Let's mark that as the next exhibit, PDX 12.

(Document above referred to was marked PDX 12 for identification, this date.)

Q In this connection with Exhibit 12, there is a reference in the text to "Creation by Robert M. Lee exclusively for Hunting World." That is you?

A That is right.

Q Are you in the shoe design business?

A Yes, I design most of the shoes that we sell. The principal examples -- I design all the shoes in the catalogue with the exception of the Johnstons & Murphy shoes, which I have some styling influence in. And the David Evans shoes, which I have practically no styling influence in; they are David Evans. All I do is design -- all I did was change the buckles.

Q So if we see reference to those two makes, we know you didn't design them?

A That is right, but I did have some influence on the Johnstons & Murphy shoes. They never made any of elephant leather before they did for us, and we also dictated some of the styling details in the Johnstons & Murphy shoes, which are produced by Johnstons & Murphy exclusively for us. They buy our leather and we buy the finished shoe back from them.

I should interject at this point that Abercrombie

& Fitch Co. have in the past and may still be selling elephant leather shoes made by Johnston & Murphy which are quite similar to a couple of our models, but they are not exactly the same.

And I should also state that I offered our elephant leather shoes to Abercrombie & Fitch's shoe buyer several years ago.

Q This is all non-responsive and I guess the record will show it. I am really not inviting you to make these speeches. But I don't want to annoy you.

Now, referringback again to this ad -- rather, the part of the catalogue on page 71, which we marked Exhibit 12, and I guess this is where I saw the mention of England in connection with shoes.

A The leather is tanned there, but the shoes are made in Portugal.

Q That is what is meant by European bootmakers?

A Right.

Q It talks about a squared toe; what is the significance of that? I have seen that elsewhere.

A It is very fashionable now.

Q That's true with women, I didn't know it was true with men.

A Oh, sure. Here, this toe, which is the square toe,

is very fashionable.

Q Is that one we marked?

A You marked that spread on page 49.

Q You are talking about the squared toes that show up on page 49, which is part of Exhibit 11?

A Yes. Here is another one, page 37.

Q Exhibit 10?

A That is right.

Q When you said you designed shoes, does that take in the SAFARI CHUKKA that was Exhibit 2?

A No, it does not, sir. The shoes that we import from Africa are the designs of the manufacturers and are really quite traditional designs.

Q Then we are just talking about the camel and the elephant shoes when it is your design, right?

A Right.

Q Before we leave the shoe and hat business, have you applied for or obtained a trademark registration in connection with any of these goods that we have been talking about?

A You mean SAFARI CHUKKA? Things like SAFARI CHUKKA?

Q Or SAFARILAND or MINI SAFARI. We did ask about SAFARILAND.

A I am not sure about MINI SAFARI. If I haven't

applied for MINI SAFARI, I intend to, but I don't remember whether or not I applied for it.

Q Can you say when your use of MINI SAFARI began?

A About a year ago.

Q When did this get first advertised?

A I really don't remember.

Q I will state that I think correspondence bears me out, but I happen to see it -- wasn't it last November in the New York Times Sunday Magazine?

A I don't remember when our first use was. It was sometime last year, but I know that we started selling them before we started advertising, because we didn't have enough of them to advertise.

Q Which catalogue did that first appear in?

A It appears first in this catalogue.

Q 1970?

A Yes. The 1969 catalogue was published at the end of '68 and we got these hats in, the first of these MINI SAFARI hats came in late last spring, I think April.

Q Taking this advertisement of Exhibit 2 captioned "Safari shoes from SAFARILAND," I believe you said this was a recent ad?

A This one is recent, yes.

Q How far back does that caption there go, in your experience?

A I think I gave it to you in one of my old ones; this is Exhibit PDX 8.

Q Is that the older style ad?

A Yes. This appeared probably about a year ago, more or less a year ago. The copy has changed very little.

Q So it appeared about a year ago. Now, is that the first time you advertised with that format?

A Safari shoes from SAFARILAND?

Q Yes.

A I don't remember, sir, whether we advertised that for the first time in '68 or in '69.

Q But it would have been one of those two years?

A '68 or '69, yes. It may go back to '67, I am not sure. It couldn't possibly go back earlier than '67, but I would have to check.

Q I would like to be informed of the earliest date that you promoted with an advertisement such shoes and then, of course, a copy of the advertisement that was involved?

A Okay.

Q I am talking about an advertisement caption

such as you have there.

A Fine. This is going to pose a rather difficult problem in that during our move three insertion order books were lost. I think that the only way that we could possibly get this information now is by having someone research the microfilm files of the New York Times for the years '67 and '68. I mean, it represents a greater loss to me than it does to you, sir. We would love to be able to find these things, but there were a couple of cartons lost and it included all my insertion order books.

Q Plese, for my information, tell me what an insertion order book is.

A When you make up an advertisement for a publication you send them the mechanical art and whatever other art work is involved, or a plate in the case of a magazine such as the New Yorker which requires a plate, together with an insertion order, an advertising insertion order stating, please publish advertisement of Hunting World, Inc., for product SAFARI shoe. Then you describe the space, like 58 lines on two columns, or whatever it might be. And how many times you want the ad to run. And then the dates that it is to run. And then the position that you want to pay for it, if you are going to pay for position. And so on.

Q Do you have more ads there that you were going to show me? You have something in brown here.

A This is not an ad. But this is an ad that has run in the New York Times last May. That's a proof from the New York Times.

MR. HOPGOOD: The witness has just handed me a proof for an ad entitled, "SAFARI clothes from Safari country."

I would like to mark this with the next number, as PDX 13.

(Document above referred to was marked PDX 13 for identification, this date.)

MR. HOPGOOD: The witness has just handed me a specimen shoe.

So that the record can show what this is about, you have handed me a shoe like the one depicted in Exhibit 6?

THE WITNESS: Yes.

Q I was looking for the markings. I see your Hunting World emblem. Is that the only marking aside from descriptive legends of origin and so on?

A It says Hunting World with our logo, made in Kenya, genuine leather insole, and the size marking, which in this case is 7 1/2.

Q Does the tag go with this article when it is sold?

A Yes.

THE WITNESS: Dick, you have a copy of the tag?

MR. WELS: Yes.

THE WITNESS: I think you also, Mr. Hopgood, have a copy.

MR. HOPGOOD: I want to have things tied together.

(Discussion off the record.)

BY MR. HOPGOOD:

Q I am anxious to see the tag if one is included in the article.

A They are supposed to be included in the article. In the last shipment they omitted them, but if you will permit me to call my office, I will tell them to find one and we will mail it to you.

Q Why don't we just note that. We may have to ask for a couple of more things.

A All right. I will try to find a tag from the SAFARI CHUKKAS, the Kenyan SAFARI CHUKKAS. I remember the last shipment came through without tags. We will have to see if we can find an old one that has it.

Q These are the ones advertised in Exhibit 6?

A Right.

Q You got this out of a box called Simba?

A Yes.

Q Is that the way it comes boxed?

A That is the way it comes. Simba is one of the manufacturer's trademarks for many of their shoes.

Q Are you referring to some literature that comes in the box when the customer gets it here?

A No.

MR. WELS: This is something he receives from the manufacturer.

THE WITNESS: I received this as a sample from the manufacturer. And this is the brochure that they distribute in Kenya with the shoes. But I don't distribute that. That's the only copy I have. That's printed in Kenya.

Q Do you have an exclusive on the U. S. retailing or distribution of these shoes?

A Yes, I do.

Q When I say "these shoes," so the record can show it, it is the kind that's promoted in Exhibit 6.

A Yes.

Q Just something about these catalogues. You

say they are a yearly thing and may become more frequent?

A Yes.

Q We have been given a copy of the '68, '69 and '70 issue; are they the only three?

A '68, '69 and '70, yes. We didn't publish more than one a year, except for the bronze catalogue, which was only published once, and which was used by Abercrombie & Fitch in the bronze exhibition that we jointly held.

Q I was looking at your catalogue for 1968, at several pages in there where you are talking about KALAHARI clothing, at pages 38 to 40.

A Right.

Q And on page 40 there is a description of the slacks. There is a reference there to leisure at the club, on the fairway or at home. Is that a fair summary of a substantial use for which you provide this clothing?

A Yes, it is real safari clothing, made in Africa, primarily for safari use. We import it to this country to sell it as leisure wear, not only to our clients who are going on safari, who, incidentally, do buy it from us, but we want to promote it for a wider market.

In my copy I stated, "Of course on safari or for any rugged outdoor use, they are in a class by themselves

due to the unique characteristics of KALAHARI cloth and KALAHARI cord."

Q But the entire suggestion in that same ad is to leisure at the club, on the fairway and at home, is it not?

A I think that for the record you should quote the whole piece.

Q It speaks for itself.

Then in the previous page, there are several other items of clothing, including women's clothing.

A Yes.

Q Is this a special cloth, this KALAHARI cloth, that --

A Yes, it is a special cloth.

Q Is it specially devised for you people to promote?

A No, it was devised by the manufacturers.

Q They are African manufacturers?

A Yes. At the top of page 38 in our 1968 catalogue, you will see a picture of three very well-known people in the safari business, on safari, near Africa's Kalahari Desert, wearing the clothes. I refer to Mrs. Jack O'Connor, the wife of Jack O'Connor, arms and hunting editor of Outdoor Life Magazine. Mrs. O'Connor is an

experienced hunter, having been on safari many times. And the two professional hunters in the picture are John Kingsley-Heath, and Frank Miller, and they are all shown wearing our authentic safari clothing, made of KALAHARI cloth, while on safari.

Q When you sell this clothing, how did it come to the customer, in a box? How is it sold?

A It is generally packaged in an unmarked plastic bag, which is then put in a store package if the person takes it out of the shop, or is mailed in a corrugated carton. The label applied says, "Hunting World," and then KALAHARI with a TM, and made in South Africa, made in the Republic of South Africa. And in the fiber content, 65 percent polyester, 35 percent viscose.

Q You use the same label; is that that string tag?

A No, in addition to the string tag.

Q Let's take the things one at a time. I will retrace my steps a bit and mark as Exhibit 14 the pages we were talking about from that 1968 catalogue, namely 38, 39 and 40.

(Documents above referred to were marked PDX 14 for identification, this date.)

Q Now let's go on to the next topic, which

is the kinds of labels used with these goods. I have a string tag.

A There is the string tag.

Q This is the string tag which goes on all of your KALAHARI items, right?

A All of the clothing made of KALAHARI cloth, not all KALAHARI items.

Q I am sorry. You do use KALAHARI on something besides --

A On the grill.

Q Let's get to the grill separately. You have just given me a string tag which you say goes on all this KALAHARI clothing?

A Yes.

Q It is captioned, "Safari clothes from Safari Country!"

A Right.

MR. HOPGOOD: Mark that Exhibit 15.

(Document above referred to was marked PDX 15 for identification, this date.)

THE WITNESS: Please don't get confused because many of our tags of other items have the zebra cover.

Q I don't see any point in cluttering the

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record with that, I am not talking about that. So the exhibit is just the printed text.

A Okay.

Q You said there was some other kind of label that was used.

A Yes, the label that's sewn in the garment says, "Hunting World," in a little logo-type with our little elephant trademark in a circle, which says, Hunting World. Than adjacent to it it says the word KALAHARI, with a TM next ot it, and then underneath the label says, " Manufactured in the Republic of South Africa," and then the fiber content, 65 polyester and 35 percent viscose. That are the only labels in the garment.

Q You don't have a sample of the label?

A No, sir, I don't.

Q You used the symbol TM with your KALAHARI. Do you have a registered trademark?

A We have it registered on the KALAHARI grill and we either have a registration pending or we are about to register it for clothing. We have used it on clothing for about three years.

Q Is this tag, which is marked Exhibit 15 -- strike that.

How long has this tag been in use, Exhibit 15?

A This tag has been in use for approximately a year. I would say they probably printed them last April or May, April or May of '69.

Q You said you were using KALAHARI on clothing before that?

A Yes, since 1967.

Q Did you have any kind of a string tag up to that point?

A No, we didn't have a string tag on the items. We described them in advertising and in the catalogue. Here is our '67 catalogue which was published for '66-'67. So this was published in '66 and then -- there you have the KALAHARI clothes, the KALAHARI hat.

Q Do you still use it on hats?

A On some hats.

Q Is that called an article of clothing so that the same string tag, Exhibit 15, would go with the hat?

A No, that string tag would not go with the KALAHARI hat. It would go with the White Hunter hat.

Q You do use this string tag with hats?

A Yes, another string tag.

Q I am trying to get the actuality of the situation as to Exhibit 15. This is used only for clothing,

not hats?

A Only for clothing, other than hats and shoes.

Q I didn't get to see this '67 catalogue before so I will look at it now.

THE WITNESS: I think that's the one where we are missing all the copies. We found one or two.

Q I see you use KALAHARI for tents.

A Yes.

Q Do you use one of the string tags on that?

A No, we don't have a string tag for tents. Here is a guide that is using KALAHARI on a hat, and we have got to write to him.

Q I wouldn't take your time with this, but can I have a copy of it?

MR. WELS: It is my only copy; will you return it to us?

MR. HOPGOOD: We will return it to you. We want to look at it.

MR. WELS: Sure, you can make a photocopy of it.

THE WITNESS: Put that on my list. If we turn up a few of them, we will be glad to furnish them.

(Discussion off the record.)

Q Directing attention to the 1969 catalogue of yours, I flag page 62, which I would like to mark with the next exhibit number, PDX 16.

(Page above referred to was marked PDX 16 for identification, this date.)

Q This is a page captioned, "Safari shoes from SAFARILAND."

Now, we have several types of shoes in this page, haven't we? They are different skins, aren't they, for the shoes?

A Well, we have --

Q Is one of them like Exhibit 6?

A Yes, the top one, the one called the SAFARI CHUKKA.

Q Then you have Kenya Club?

A Yes.

Q Is that the same kind of shoe?

A It is a very similar shoe made by the same manufacturer, but a little bit lower, the cut is a little bit lower than the chukka. In other words, it is slightly higher than an ordinary oxford or slightly lower than a chukka, and the height would be called in the shoe trade as a demi-boot.

A demi-boot height is a little higher than a shoe

and a little lower than an ankle boot or chukka.

Q What do you call that one below? It is called HIPPO SAFARI in your entry.

A It is exactly the same cut as the Kenya Club, but in hippo leather.

Q Like a half-boot?

A Yes. Some people prefer towear a demi-boot, a lower shoe than a chukka, in Africa or on safari.

Q Now, is the big feature of that HIPPO SAFARI that it is made with hippopotamus skin?

A Yes.

Q Does it have a counterpart in the elephant skin?

A No.

Q I notice in the box on that page there is the text, "When ordering SAFARI shoes, please state regular shoe size," et cetera.

A Right.

Q Is that a customary instruction you give in your ads for shoes?

A Yes. In our ads for shoes, we generally don't make it that long because in space advertising we try to save space. We usually say, "State regular shoe size."

In our catalogue where we have a little more space,

we say, as in this case and also in our 1970 catalogue on page 66, "When ordering SAFARI shoes, please state regular shoe size for proper fit."

Q Are the shoes shown on page 62, namely, Exhibit 16, all made by the same people?

A No, only the top three. The bottom one called the KALAHARI boot is made in South Africa by another manufacturer. The top three are made by the same manufacturer in Kenya.

Q I guess what I am driving at is whether these are made by the same people who make your veldt boots?

A No.

Q So that tag on your veldt boots doesn't apply to these shoes?

A It doesn't apply, but I wrote the copy for this tag and the other tag, and they are quite similar.

Q What I am referring to now is, if you have one I would like to have it, is to show what tag goes in these shoes.

A On the outside it looks exactly like this except I think it says, authenticity from Kenya, perhaps, and the text is slightly different. We will try to find that.

Q But in general the text is as you just

showed me on this?

A It is quite similar to that.

MR. HOPGOOD: Let's mark this as the next exhibit number, PDX 17.

THE WITNESS: That's the tag that goes on the SAFARI CHUKKA shown at the top -- I am sorry, on the veldt boot.

Q But the text is similar, you said, it says, "SAFARI shoes from Safari Country." Right?

A Yes, but the veldt boot is made of a little different leather, so it would be changed a little there. Also the tag for the veldt boot was printed in South Africa, this is printed in -- this is printed in South Africa and the other was printed in Kenya.

(String tag above referred to was marked PDX 17 for identification, this date.)

Q How long has it been your practice to use the string tag exemplified by the one we just marked?

A Approximately one year, a little over a year.

Q Is that true whether they are veldt boots or the other kind of shoes with the same general text?

A Yes, sir.

Q Is it fair to say that the clothing which you describe in connection with KALAHARI and the tags, and

so on, is woven cloth sporting apparel?

A Woven cloth sporting apparel, yes, it is a poplin weave, it is woven cloth.

Q Is it fair to say that that clothing is men's outerwear?

A Men's and women's outerwear.

Q You use it for outwear exclusively, don't you?

A Yes.

Q I don't remember your submitting an ad such as I xeroxed here, and I would like you to identify this.

A Yes, I think you submitted one of these to us.

Q No, but I am talking about this morning. I am trying to identify things for the record.

A Okay. This is an ad for an elephant leather SAFARI CHUKKA that appeared in the New York Times Magazine probably a year or more ago because we discontinued that particular model.

MR. HOPGOOD: We will mark this ad just identified, namely, "The SAFARI CHUKKA, elephant is the name of our game," as Exhibit 18.

(Document above referred to was marked PDX 18 for identification, this date.)

Q Here is another one I don't remember your

submitting this morning, and to be complete as I can make it, I will ask if you can identify that one?

A Yes, that's the same one. That's our first genuine elephant SAFARI CHUKKA which we discontinued, and that's why it was put on sale.

MR. HOPGOOD: I would like to mark this ad just identified by the witness as Exhibit 19 for identification, "The SAFARI CHUKKA."

Q Did you say what paper this was in?

A This was in the New York Times daily.

(Document above referred to was marked PDX 19 for identification, this date.)

Q You say this ad of Exhibit 19 represents a discontinued item?

A Yes. We still have a few pairs in stock, but we are not advertising it any more.

Q I forget whether you told me, but I will ask it again, I am sorry to repeat but I don't mean to, when did you first advertise this particular model of shoe?

A I think that we advertised that for the first time in June, '68, in the New Yorker. To the best of my recollection, that was the first time we ever advertised that shoe.

Q Was this substantially the style of the ad in Exhibit 19?

A Well, it started with "Elephant is the name of our game," and it was quite substantially this kind. I think it was more like that one there.

Q You are referring to Exhibit 18?

A Yes, it was more like Exhibit 18 style.

(Discussion off the record.)

Q There is a reference to blunted toe in the advertising text; is that a fairly recent style change?

A It came in in '67 or '68.

Q I thought I had marked this particular one before, but I don't think I have, and I am not trying to duplicate anything.

MR. HOPGOOD: I will mark this as Exhibit 20, which is a New York Times Magazine ad --

THE WITNESS: You had another one exactly like it here a moment ago. Oh, no, this is right, this is a new one. This is again part of that same group of other shoes that we started out with, with Exhibit 2 and Exhibit 6.

Q It falls in that pattern of collective advertising of the same shoe?

A Yes.

(Document above referred to was marked PDX 20 for identification, this date.)

MR. HOPGOOD: Mark as Exhibit 21 -- we will say an ad, "The SAFARI hat for town and country is here," which appears to be along the lines of Exhibit 7, with a different address.

Q Is that then representative of how you kept the same ad going over a period of time?

A Yes.

Q Before and after your move?

A Yes.

(Document above referred to was marked PDX 21 for identification, this date.)

Q Let's just, to be complete, go through the list of items to be produced.

On MINI SAFARI you have given us information concerning one hat. Is that all the spread of goods in connection with which you have used MINI SAFARI?

A Yes, it is.

Q Did you bring any purchase orders or shipping record receipts for 1970 or prior thereto between the seller and you?

MR. WELS: We have not gotten those together, no.

MR. HOPGOOD: Are you declining to produce them?

MR. WELS: Mr. Lee has one specimen example of a purchase order, a shipper's order, with him. He has not been able to get these things together in the short time since Friday.

I would certainly question the relevance of --

MR. HOPGOOD: I will tell you what I am anxious to do.

You have heard me ask a few questions. I am anxious to find out when some of these things started, and then, of course --

MR. WELS: He can tell you.

MR. HOPGOOD: He is just going by oral recollection, whereas if you had the purchase order or some kind of shipping paper, it would show when it started.

MR. WELS: If you want us to give you -- to get the information together for you as to when it started, the initial purchase orders, that we can supply you with.

MR. HOPGOOD: Then we can have a look at the paper if it exists.

MR. WELS: We will do our best to get that

together for you.

MR. HOPGOOD: Thank you. You will see the same kind of question repeats itself for each of several items here.

MR. WELS: I take it you are not standing on your demand that all of these purchase orders for this period is involved?

MR. HOPGOOD: To run this kind of examination, it is very convenient if you happen to have that sort of material ; then we can ask questions on volume of use without knowing all your private details.

I would like to know when it started and the piece of paper that supports it.

MR. WELS: We will do our best to get that information. That will refer to the other items in which you are asking for purchase orders.

MR. HOPGOOD: Yes, Item 3 and its counterpart, 4, which refers to the SAFARI CHUKKA.

MR. WELS: That relates to 6 and 8 as well.

MR. HOPGOOD: Item 5 is the HIPPO SAFARI, same kind of question. And 6 would be its evidence of first use.

When we are talking use, we are talking use

in this country. So that's why I came down to the invoice or the shipping memo, or what have you, that evidences its coming into this country.

Have we had production of Item 7 in this Exhibit A?

THE WITNESS: The big Dorian safari hat I have here.

MR. WELS: Here it is, if you want to see that.

THE WITNESS: This is the big, wide brim Dorian safari hat from which the MINI SAFARI hat was derived by cutting down the brim.

BY MR. HOPGOOD:

Q Is it the one on the left of Exhibit 4?

A Yes, but the one on the printed leaflet has a leopard band and the one I am showing you has a puggaree band. It is offered with three styles of band.

Q The one in the photograph of Exhibit 4 is a skin?

A Right; that one we are no longer importing with the leopard band. We are only importing the hat with the silk puggaree band and with the zebra skin band.

Q Is there any reason for that?

A Yes. There is a lot of controversy with respect

string tags which have a lot of descriptive matter?

A Yes, but they don't go on the elephant leather goods.

Q You don't have a sample of this tag, do you?

A Yes -- pardon?

Q You don't have a sample of this elephant tag with you?

A No.

Q Did it come with the papers you served on us?

A I don't think it is relevant. You are welcome to have one.

Q I would like one.

A All right. Then we use a tag like this, which is just on our fur rugs and pillows.

Q Thanks, I don't need that one.

A Then we use a plain circular die-cut tag that looks on this trademark with nothing on the back, just the price tag. Those are all the tags that we use.

Q I think you said some of your clothing comes in a bag.

A A common, ordinary plastic bag the way a lot of commercial clothing is packed, and it says nothing at all on it. It is just a dust cover.

Q Of course your shoes come in boxes. Are they the only items we have been talking about that come in boxes?

A The hats come in boxes, but we repack -- in other words, we get the manufacturer's box, which contains seven hats per box in the case of MINI SAFARI, or four in the case of BIG SAFARI, and we repack them in ordinary corrugated cartons when we send them out, not a printed box.

MR. HOPGOOD: I would like the record to show what the printing inside the hatband of this Exhibit 22 hat says. It has "Dorian" and underneath that, "SAFARI."

THE WITNESS: The other side says what?

Q I am talking about this. I am perfectly correct, aren't I?

A Yes, one side of the hat box says, "Dorian," and then the word "SAFARI" under it.

Q All capitals?

A Yes, it is in block letters so it's got to be capitals. The other side says, "MADE IN SOUTH AFRICA FOR HUNTING WORLD, NEW YORK." That's all in capital letters.

Q Does your merchandising of the various articles we have been talking about range beyond the

United States?

A We get occasional mail orders, retail mail orders from people outside of the United States. Offhand, we have sold a small quantity of goods to practically every country.

Q But as to all such sales, they still involve the origin of the goods right here in New York?

A Yes, we ship from New York.

Q Did you bring with you copies of any trademark registrations or trademark applications?

MR. WELS: Yes.

A Yes.

Q Could I see them, please?

A Yes. Here is a trademark registration No. 876049 for the word KALAHARI, for barbeque grills.

Q I don't want to mar your item which you have just produced, but if we can just make a xerox, we can mark the xerox of just the page that describes the item. We don't need the seal.

MR. WELS: All right.

MR. HOPGOOD: Let's deem that as Exhibit 23.

(Document above referred to was deemed marked PDX 23 for identification, this date.)

THE WITNESS: No. 875662, for the trademark

HUNTING WORLD for a catalogue in booklet form.

MR. HOPGOOD: Let's proceed in the same manner and give that the next number, Exhibit 24.

(Document above referred to was deemed marked PDX 24 for identification, this date.)

Q Do you sell the catalogue?

A We do sell the catalogue in the store. We give it away by mail. We charge 25¢ for it in the store. Then we have other catalogues that we also sell. We have bronze catalogues that we sell for $2 and we have a color catalogue of fur rugs and pillows that we sell for $2. Here is a figure receipt, serial No. 342973 on the word "LOAFAROUND." Do you want this?

MR. HOPGOOD: Yes, please.

THE WITNESS: You will make a xerox of that for me?

Q Do you have anything to indicate what the goods are?

A It is a shoe, this shoe.

Q I would like to see how you described it; do you have a piece of paper which shows that?

A I will look for it. I may. This is my covering letter. I am trying to find a copy of it.

Q It would be a copy of your application?

A Yes, here. LOAFAROUND, LOAFAROUND footwear, applied for for footwear.

Q I see this is incomplete text. You have given me a carbon copy of what appears to be the typed information that you may have put on a form.

A Yes, this is the form, application for trademark registration (indicating).

Q I see that you say that the mark is stamped on the product and on the package?

A LOAFAROUND, yes.

Q Does this kind of an application mark appear for any of your other goods?

A Well, our SOMBRELLAS have a label attached to the umbrella and to the package.

Here is an application for HUNTING WORLD for use on goods, the catalogue, the publication and diversified merchandise including clothing, luggage and leather goods, fur rugs, pillows, throws, furniture and decorative accessories.

Then they wrote back we had to resubmit it in a different way. So we got the first for HUNTING WORLD as a catalogue and then we sent them another application for HUNTING WORLD as a label on the goods.

Q So what you told me is a description of the

goods you -- as you had it in the original --

A It had to be amended because not being a patent attorney or attorney of any type, I was rather ignorant of the method in which goods are broken down into categories for trademark application purposes.

Q Is this a pretty fair description of the kind of thing that you advertised for people to come in and get out of your SAFARI shop?

A Yes, that's a pretty fair description of Hunting World's merchandise, range of merchandise.

MR. HOPGOOD: Let's mark the copy of your original application description as Exhibit 25.

(Document above referred to was marked PBX 25 for identification, this date.)

THE WITNESS: Here is one on the KALAHARI grill.

Q You gave us the registration there, so that takes care of that.

A Okay.

Q You originally described it the same as it is in the registration, didn't you?

A Yes. Here is the SCORPELLA; do you want this?

Q No.

A Here is HUNTING WORLD; I think you have the registration

on that.

Q Is that the one on the catalogue?

A That is right. Here is HUNTING WORLD and elephant circle design, which is this logo here (indicating).

Do you want that? It is to put on goods.

Q That is, clothing?

A Clothing and -- let me see if I can find it.

Q Does that go with what we marked as Exhibit 25?

A I think so.

MR. WELS: If you don't know, don't guess.

THE WITNESS: I am not sure; I think so.

Q This says HUNTING WORLD?

A Yes, but this one is for a mark and this just for the name. I am going to see if there is any related material. It may have been this one (indicating).

MR. HOPGOOD: Let's mark this as Exhibit 26. We can reproduce both your filing receipt and your carbon copy of the typed information on the same sheet, and call it collectively 26.

(Documents above referred to were marked PDX 26 for identification, this date.)

THE WITNESS: Do you have the date of my carbon copy; is it September on there?

Q It only has a date of first use, I assume,

October 15, 1965.

A Right. I have shown you all of the trademarks and application forms that I have been able to find. Now I don't recall whether or not we applied for MINI SAFARI and SAFARILAND. I know I had intended to and maybe I did, but I don't remember.

MR. WELS: We will let you know.

Q I realize you got your problems in a short period of time in giving me the answer to when you started using the various kinds of things we have been inquiring into.

But averting to No. 10 in our list, what I am after is when you began each of the different kinds of practice that we identified with your shoes. For example, you have the HIPPO SAFARI, the SAFARI CHUKKA and the elephant, and so on.

A Yes. This goes beyond '69. You want the earliest ones that we can find?

Q As to each kind.

A Yes.

Q I am anxious, of course, to find it in the context of U. S. usage.

A Right.

Q Which would be an offer for sale, like

catalogue or an advertisement would be.

A You are making few purchase orders from the manufacturer.

Q It is a way of identifying the date. I assume you sell it soon after you get it from your supplier?

A Yes, but in some cases we don't advertise it soon after. We show it in the shop, because very often we will only import a relatively small quantity to test the customer reaction before going into an advertising program.

Q Let me put it this way: In my questions to you, because you haven't had time to find all these things, you have given me your recollection.

A Right.

Q I would like to have it pinpointed, if you can.

A Okay, we will do our best.

Q No. 11 was for all the advertising on the SAFARI CHUKKA in the last three years.

A You have representative copies of all of it, but I haven't given you every single insertion because I frankly don't have them.

Q This was stated within the last three years; that's pretty much the period when you were advertising it as such, isn't it?

A Yes.

MR. WELS: That was primarily the New York Times, Wall Street Journal and New Yorker?

THE WITNESS: Right.

Q Of course, subject to particular ads being identified at different times.

Have you shown us -- I am now on Item 12, Have you shown us representative advertising relating to the SAFARI hat or MINI SAFARI within the last three years?

A Yes, sir.

Q And the dates are as you have stated for these ads?

A Yes. And you have seen the catalogues going back to '66, '67?

A Yes.

Q We are going to have a look at the '66 and '67. I haven't studied that.

Now, looking at No. 13 on the list, have we seen all representative ads of your for all other kinds of advertisement in which SAFARI appears in combination with other words or alone?

A Yes, to the best of my recollection, you have seen typical examples of all of our ads in which the word SAFARI, in connection with other words may have been used

in connection with clothing or other merchandise.

Q Have we seen representative materials in connection with KALAHARI?

A Yes. I think you have -- you have not seen copies of any of our ads on the KALAHARI grill. We have not advertised the KALAHARI grill in newspapers or magazines for a couple of years, one of the principal reasons being that Abercrombie & Fitch advertised it on their own behalf and we sold it to them for quite a while, as far as local New York newspaper advertising is concerned.

Q Referring to No. 15 --

MR. WELS: We claim a claim of confidentiality as to that.

MR. HOPKOOD: Let's see if we can't get to the guts of that anyway without breaking any confidence.

Q Can you state the size of your list of customers to whom you send catalogues?

MR. WELS: I would again say that as to that, that until such time as you have established that there has been an infringement for which you are entitled to an accounting, you are not entitled to have information with respect to customers.

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Q How widely do you distribute your catalogue?
A By widely, what do you mean? Primarily within the United States.
Q Is there a primary area in the United States where these catalogues go?
A I would say certain parts of the country probably have greater saturation; we have more customers in certain parts of the country than others. But I really do not have at my fingertips a state-by-state breakdown, so I can't give you that information.
Q Are you prepared to say the New York area is the biggest?
A I am not so sure that West Coast and Texas isn't as big as the New York area; I mean, isn't as big as the New York - eastern states.

MR. HOFFOOD: Thank you.

We have some requests in. We are supposed to have a look at some of your advertisements.

(Discussion off the record.)

BY MR. HOFFOOD:

Q I am sorry to have to ask you another question, but I would like to know something of your background.

You gave us your age, you told us when you started your expedition, and so forth. Do you have a

specialty and training background?

A Yes. I was trained in industrial engineering and I attended Lehigh University for approximately three and a half years, in industrial engineering. And I left school to start in the construction business in 1951. And I founded a group of construction companies and specialized in the building of residential communities in New York State from 1951 until about 1960. I am still remotely connected with that in that I am still an owner of vacant land which has been partially developed. But I stopped active construction approximately 1961.

I started -- the reason I went into the safari business actually is that I wanted to spend more time in Africa. So I started going over in '55 and by '60 it was a full-time business.

(Discussion off the record.)

THE WITNESS: We advertise MINI SAFARI as one word with a little TM after it to indicate trademark. Dawson stamps it in the hats as two words because in South Africa that's the way they think it looks better. We think it looks better as one word, and we have asked them on future shipments to stamp it as one word.

(Continued on the following page.)

MR. REPSOLD: All right.

(Thereupon, at 1:35 p.m., the deposition was adjourned.)

ooo

Robt McLee
ROBERT H. LEE

Subscribed and sworn to before me this 5 day of June 1970.

Rich. H Wells.
Notary Public

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ooo

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STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, Samuel Singer, Notary Public of the State of New York, do hereby certify that the foregoing deposition of [redacted], was taken before me on the 25th day of May, 1970.

The said witness was duly sworn before the commencement of his testimony; that the said testimony was taken stenographically by myself and then transcribed.

The within transcript is a true record of the said deposition.

I am not connected by blood or marriage with any of the said parties, nor interested directly or indirectly in the matter in controversy, nor am I in the employ of any of the counsel.

In witness whereof I have hereunto set my hand and seal of office at the County and State of New York, this 28th day of May 1970

Samuel Singer

03-9023280 Bronx County
Expires 3-30-70

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 10 day of MARCH , 1975 at No. deponent served the within APPENDIX upon MOSS, WEIS & MITRANI the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the ATTORNEY FOR APPELLEE therein.

Sworn to before me,
this 10 day of MARCH 19 75

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973